82-308

No._____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

DELPRO COMPANY,

Petitioner

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL LODGE OF BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; AND NATIONAL MEDIATION BOARD OF THE UNITED STATES OF AMERICA,

Respondents

and

DELPRO COMPANY,

Petitioner

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, INDIVIDUALLY AND ON BEHALF OF THOSE EMPLOYEES WHOM IT IS CERTIFIED TO REPRESENT AND JACK WEATHERLOW, INDIVIDUALLY AND IN HIS CAPACITY AS VICE CHAIRMAN OF THE BROTHERHOOD RAILWAY CARMEN LOCAL AFFILIATE,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Is Delpro Company, a company engaged in the repair of rail cars, a "carrier" pursuant to the Railway Labor Act and therefore subject to the jurisdiction of the National Mediation Board?

2. Did the National Mediation Board adequately set forth the basis for its determination of jurisdiction over Delpro Company?

DESIGNATION OF CORPORATE RELATIONSHIPS

Delpro Company, filing this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit as petitioner, states that:

1. This is its original Designation of Corporate Relationships.

2. Trailer Train Company is the parent of Delpro Company.

3. Trailer Train Company is not owned by any parent corporation.

4. Delpro Company does not have an ownership interest in any subsidiaries.

5. The only affiliates of Delpro Company are Hamburg Industries, Inc., Acorn Industries, Inc., and Calpro Company.

6. The shareholders of Trailer Train Company are:

a. The Atchison, Topeka and Santa Fe Railway Company,

b. The Baltimore and Ohio Railroad Company,

c. Boston and Maine Corporation (Robert W. Meserve and Benjamin H. Lacy, Trustees),

d. Burlington Northern Railroad Company,

e. Central of Georgia Railroad Company,

f. The Chesapeake and Ohio Railway Company,

g. Chicago and North Western Transportation Company,

h. Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Richard Ogilvie, Trustee),

i. Chicago, Rock Island and Pacific Railroad Company (William M. Gibbons, Trustee),

j. Consolidated Rail Corporation,

DESIGNATION OF CORPORATE RELATIONSHIPS—*(Continued)*

k. The Denver and Rio Grande Western Railroad Company,

l. Detroit, Toledo and Tronton Railroad Company,

m. Erie Lackawanna Railway Company (Thomas F. Patton and Ralph S. Tyler, Jr., Trustees),

n. Florida East Coast Railway Company,

o. Illinois Central Gulf Railroad Company,

p. The Kansas City Southern Railway Company,

q. Louisville and Nashville Railroad Company,

r. Missouri-Kansas-Texas Railroad Company,

s. Missouri Pacific Railroad Company,

t. Norfolk and Western Railway Company,

u. Reading Company,

v. Richmond, Fredericksburg and Potomac Railroad Company,

w. St. Louis Southwestern Railway Co.,

x. Seaboard Coast Line Railroad Co.,

y. Southern Pacific Transportation Co.,

z. Southern Railway Company,

aa. Toledo, Peoria & Western Railroad Co.,

bb. Union Pacific Railroad Company,

cc. Western Maryland Railway Company, and

dd. The Western Pacific Railroad Company.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Delpro Company ("Delpro") respectfully requests, pursuant to 28 U.S.C. §1254(1), that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review and to reverse the Judgment of that court, entered April 13, 1982 (rehearing denied May 14, 1982), affirming an order of the United States District Court for the District of Delaware declaring Delpro to be a "carrier" for the purposes of the Railway Labor Act ("RLA"),[1] and, therefore, an employer subject to the RLA.[2]

OPINIONS BELOW

The National Mediation Board ("NMB") Mediator issued an investigative report on September 10, 1980. App. A-15. The NMB issued a Determination of Jurisdiction on October 1, 1980. 8 NMB No. 2 (1980); App. A-21. On October 15, 1980, the NMB denied a Delpro petition for reconsideration. 8 NMB No. 16 (1980); App. A-28. The NMB certified the Brotherhood Railway Carmen ("BRC") on December 17, 1980. 8 NMB No. 54 (1980); App. A-34.

The District Court granted summary judgment in favor of the BRC on August 7, 1981. *Delpro Company v. Brotherhood Railway Carmen*, 519 F. Supp. 842 (D. Del. 1981); App. A-36. On August 28, 1981, the District Court enjoined Delpro to bargain with the BRC. App. A-49. Delpro's motion to stay the injunction pending appeal was denied on September 4, 1981.

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1. 45 U.S.C. §§151-188.

2. Delpro is the sole party filing this petition. In one of the consolidated cases below John Taylor, Dan Lentz, Dan Miller, Joe Le Conte, Wayne Sigley, Jerry Okad , John Markovitch, Gerald Klidies and E. A. Copeland were defendants along with Delpro in their individual capacities and as representatives of Delpro. Since the only relief granted was against Delpro, the individuals named no longer have an interest in this litigation. None of these individuals participated in the proceeding before the Court of Appeals.

The Court of Appeals for the Third Circuit denied a similar motion to stay the injunction on September 27, 1981. The Court of Appeals issued its decision on April 13, 1982. *Delpro Company v. Brotherhood Railway Carmen*, 676 F.2d 960 (3rd Cir. 1982); App. A-3, A-51. The Court of Appeals denied Delpro's petition for a rehearing en banc on May 14, 1982. App. A-53.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit which Delpro is asking this Court to review was entered April 13, 1982. Delpro timely filed a petition for rehearing en banc on April 27, 1982, which was denied on May 14, 1982. This petition has been filed within the 90 day period following the denial of the petition for rehearing as required by 28 U.S.C. §2101(c). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves an attempt by the NMB to expand the jurisdiction of the RLA to Delpro, a company which is not a railroad and which does not provide transportation services. In the absence of such an expansion, Delpro and its employees would be subject to the National Labor Relations Act (NLRA).[3] The case also involves the definition of "transportation" under the Interstate Commerce Act[4] as it was formulated at the time of passage of the 1934 Amendments to the RLA. App. A-57.

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3. 29 U.S.C. §§151-188.
4. 49 U.S.C. §§10101-11917.

STATEMENT OF THE CASE

Trailer Train Company ("TTX") operates a pool of rail cars which are made available to common carriers by rail who sign a pooling contract and car contract governing use of the cars. App. A-44. Under these contracts, the carriers may only perform "running repairs."[5] All extensive repair work is the responsibility of TTX. App. A-44.

Neither Delpro nor TTX operates as a common carrier by rail. Neither owns any rail lines. TTX reports to the Interstate Commerce Commission ("ICC") pursuant to a pooling order.[6] However, these reports are for informational purposes only, and the ICC has specifically noted that TTX is not a carrier.[7] App. A-19. At the time of the hearing below, TTX's stock was owned by 29 operating railroads, the trustees of two former operating railroads and one freight forwarding company. App. A-43, A-44.

Delpro Company ("Delpro") is one of four wholly-owned subsidiaries of TTX which performs repair work for TTX.[8] The other three repair subsidiaries are Hamburg Industries, Inc. ("Hamburg"), Calpro Company ("Calpro") and Acorn Industries, Inc. ("Acorn").[9] App.

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5. "Running repairs" is a term of art referring to those minimal repairs which do not constitute extensive repairs. "Extensive repairs" are defined by the American Association of Railroads ("AAR") in Rule 108 of the *Field Manual of the AAR Interchange Rules* (1982).

6. *American Rail Box Car Company and Trailer Train Company et al.*, 347 ICC 842 (1974).

7. *Id.* at 880-881.

8. Delpro has been closed down indefinitely. Delpro may be reopened in the future if economic conditions permit. BRC has filed an action in Delaware (*Brotherhood Railway Carmen v. Delpro Company*, D. Del. CA 82-464) complaining of violations of the RLA and seeking, *inter alia*, to negotiate a contract and the effects of the closing under §6 of the RLA (45 U.S.C. §156).

9. Hamburg was acquired in 1974. Calpro was organized in 1977, Delpro in 1978 and Acorn in 1979.

A-17. TTX has at various times arranged with 30 independent rail car companies for car repairs. App. A-17. Prior to the acquisition of Hamburg, TTX's car repair requirements were met entirely by arrangements with independent car repair facilities, none of whom was or is a railroad or carrier subject to the Interstate Commerce Act.

The employees of Hamburg and Calpro are represented by the International Brotherhood of Teamsters and the United Steelworkers of America, respectively, and were organized pursuant to NLRA procedures. App.-19. Acorn's employees are not organized, and Delpro's employees were not organized until the events surrounding this controversy. App. A-15, A-19. Of the independent repair companies which performed the work undertaken by Delpro and its sister companies upon their formation, at least six have employees who were organized pursuant to the NLRA. None of such independent companies' employees was organized pursuant to the RLA.

On August 20, 1980, the Brotherhood Railway Carmen of the United States and Canada, AFL-CIO ("BRC") filed an "Application for Investigation of a Representation Dispute." NMB Mediator Samuel Cognata conducted a "field investigation" at Delpro's facility. App. A-15. On October 1, 1980, the NMB issued a "Determination of Jurisdiction" in which it held that Delpro was a "carrier" within the meaning of the RLA and thus subject to its jurisdiction. App. A-21. With the leave of the NMB, Delpro filed a "Petition for Reconsideration" requesting the NMB to reverse its jurisdictional decision or to order a formal hearing. This petition was denied on October 15, 1980. App. A-28. In accordance with its jurisdictional decision, the NMB proceeded to conduct an election among the employees of Delpro, and on December 17, 1980, BRC was certified as the bargaining representative of the employees. App. A-34.

Between the time of the denial of its petition for reconsideration and the election, Delpro brought suit against the NMB in the United States District Court for the District of Delaware seeking a declatory order that it is not a carrier and asking for appropriate injunctive relief. The court rejected the NMB's contention that it lacked subject matter jurisdiction to review the NMB's determination of jurisdiction, but dismissed the action for failure to join the BRC as a defendant. *Delpro Company v. National Mediation Board*, 509 F. Supp. 468 (D.Del. 1981). Delpro refiled with the district court on March 11, 1981, joining the BRC and the NMB as defendants. The following day the BRC filed a separate district court action to enjoin Delpro from refusing to bargain in good faith. The two actions were consolidated by the court, and on August 7, 1981, it granted summary judgment declaring Delpro to be a "carrier" under the Railway Labor Act.[10] App. A-36. On August 28, 1981, the District Court issued an injunction ordering Delpro to bargain with the BRC. App. A-49. Delpro appealed the decision to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1292(a).[11] On April 13, 1982, the Court of Appeals affirmed the judgment of the District Court even though it found "somewhat plausible" Delpro's contention that its functions were not within the coverage of the RLA and recognized that Delpro's reading of the statute would exempt Delpro from coverage by the RLA. App. A-3. A petition for rehearing en banc was timely filed and was denied on May 14, 1982. App. A.53.

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10. The District Court had jurisdiction to grant the relief requested in the two actions pursuant to 28 U.S.C. §§1331, 1337 and 2201. Additionally, the District Court properly determined that it had the power to review the NMB's decision concerning its jurisdiction. *United States v. Feaster*, 410 F.2d 1354, 1361-62 (5th Cir.), *cert. denied sub nom., Feaster v. United States*, 396 U.S. 962 (1969).

11. Delpro's motions to stay the injunction pending the appeal were denied by the District Court on September 4, 1981, and by the Court of Appeals on September 27, 1981. App. A-6.

REASONS FOR GRANTING THE WRIT

The NMB's determination that Delpro is a "carrier" pursuant to the RLA is an unjustifiable expansion of the jurisdiction of the NMB and of the class of employers covered by the RLA. This expansion is contrary to the plain language and the intent of the Act, as shown by its legislative history[12] and the statutory scheme apparent from the RLA on its face. This petition will demonstrate a clear congressional purpose to limit the RLA's coverage to railroads and subsidiaries of railroads *engaged in transportation and regulated by the Interstate Commerce Act*. Delpro is neither a railroad nor such a subsidiary. In attempting to justify its decision, the NMB found it necessary to depart from its previously announced standards. In doing so, it failed to clearly set forth the basis for this departure. For these reasons, the NMB's determination of jurisdiction should have been reversed.

I. This Case Presents Important Questions of Federal Law Which Must Be Addressed by this Court in Order to Clarify the Boundary Between the Railway Labor Act and the National Labor Relations Act.

This case presents the question of which federal labor statute covers Delpro and its employees. It is clear that the RLA and the NLRA are mutually exclusive in their coverage of employers and employees.[13] Therefore, a decision as to the jurisdiction of one statute necessarily precludes the jurisdiction of the other. In this case, the decision of the Court of Appeals that Delpro is a "carrier" and therefore subject to the RLA has placed the relations between Delpro and its employees under a scheme

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12. The proper construction of labor legislation often requires consideraton of its legislative history and the intent of Congress. *Wirtz v. Local 153, Glass Bottle Blowers Ass'n.*, 389 U.S. 463 (1968); *Feaster, supra.*

13. The definition of "employer" and "employee" in the NLRA both exclude persons "subject to the Railway Labor Act, as amended from time to time". App. A-56, A-57.

of regulation wholly distinct from the NLRA which regulates the relations between Delpro's sister car repair companies and their employees even though the employees of all those companies perform identical work. The resulting dichotomy is not justified by the RLA or any discernible public policy. Unless reversed, this decision will produce the unfortunate result, anticipated in another case by the United States Circuit Court of Appeals for the Ninth Circuit, that different statutes will govern labor relations involving the same work.[14] In light of the exclusivity of the statutes, this dichotomy is untenable, and is likely to spawn further litigation.

Apart from its effect upon the approximately 500 employees at the NLRA organized plants,[15] this determination has the potential to expand the coverage of the RLA beyond what was intended. Any expansion of the RLA would serve to deprive not only Delpro and other employers, but also employees, of rights to which they would otherwise be entitled under the NLRA.[16] For example, under the RLA the right to self-help (strikes, lock-outs, etc.) is greatly limited. Additionally, there is no procedure for decertification under the RLA. This case offers the Court the opportunity to set forth the proper limits of the NMB's jurisdiction. Without such limits, the NMB will be free to take jurisdiction, as it has done here, over a company which the RLA was never meant to cover. Although the particular considerations as to Delpro's carrier status may be limited to Delpro and the other TTX subsidiaries, the general guidelines

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14. *Pan American World Airways, Inc. v. United Brotherhood of Carpenters & Joiners of America*, 324 F.2d 217 (9th Cir. 1963), *cert denied*, 376 U.S. 964 (1964).

15. Hamburg has approximately 280 employees, and Calpro approximately 235 employees.

16. *Pan American, supra* at 222-23; *Jackson v. Northwest Airlines, Inc.*, 270 F. Supp. 501, 505 (D. Minn. 1947), *aff'd sub nom. Northwest Airlines, Inc. v. Jackson*, 185 F.2d 74 (8th Cir. 1950), *cert. denied sub nom. Jackson v. Northwest Airlines, Inc.*, 342 U.S. 812 (1951).

which the NMB has breached are applicable in every case dealing with subsidiaries of carriers. Thus, this decision has the potential to affect a great number of other employees around the country and to present recurring questions of interpretation.

No one contends that Depro is a "carrier" within the meaning of the Interstate Commerce Act and subject to the RLA for that reason. Therefore, in order to be a "carrier" under the RLA, Delpro must meet a two part test.[17] It must first be "owned or controlled" by a "carrier."[18] Secondly, and more importantly, it must meet the "function test", *i.e.*, it must perform "any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . ."[19]

Delpro contends that the functions of an employer covered by the RLA are limited to "transportation service" as defined by the Interstate Commerce Act.[20] This Court has never ruled on the scope of this test.[21] A decision on this matter would clarify the jurisdictional boundary established by the RLA and the NLRA, and would provide the guidance necessary to assure that employees performing the same function are subject to the same regulation instead of exposing such employees to two distinctly different regulatory schemes. Also, a decision on this matter would be instructive to the two agen-

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17. App. A-36, A-56.

18. The courts below determined that Delpro was "owned or controlled" by a carrier. While Delpro does not concede that the courts properly applied this aspect of the statute, that determination is not advanced here as a reason for granting the writ except to the extent discussed in Section V, *supra*.

19. App. A-56.

20. *See* Sections II-IV, *infra*.

21. In *Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946), the Court expressly did not decide the question of whether similar language in the Railroad Retirement Act was broader than the coverage of the Interstate Commerce Act. *Id.* at 452-53.

cies which administer these acts and would promote uniformity and consistency in their actions.[22] Only through a decision by this Court can future inconsistencies like those which now exist between employees performing *identical* work for *identical* subsidiaries of TTX be avoided. The Court should grant the writ of certiorari requested in order to determine this important federal question as to the discrete coverages afforded by the RLA and the NLRA.

II. By Determining that Delpro Is a "Carrier" for the Purposes of the Railway Labor Act, the Court of Appeals Decided an Important Question of Federal Law Contrary to the Plain Language of the Statute.

As noted previously, the RLA sets forth a function test which a subsidiary must meet before it qualifies as a "carrier." Thus, the RLA provides that a "carrier" is a company which performs

> any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . .

45 U.S.C. §151, First; App. A-56. The express mention in a statute of certain items implies, in the absence of contrary legislative intent, the exclusion of other similar items.[23] Thus, for Delpro to qualify as a "carrier," it must perform one of the listed services expressly mentioned.

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22. In the usual case, the NLRB will refer the question of an employer's carrier status to the NMB. *Georgia-Pacific Corp.*, 220 NLRB 885 (1975). This will often eliminate inconsistencies. However, when called upon to certify Delpro's sister companies, Hamburg and Calpro, the NLRB believed that it was so clear that Hamburg and Calpro were *not* carriers that the question was never referred to NMB.

23. *Matter of White*, 2 B.R. 656, 664 (E.D. Mich. 1980) (expressio unius est exclusio alterius). *See also Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980).

There has been no contention that Delpro performs any service connected with the "receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad." Only if Delpro performs a service in connection with the "transportation of property transported by railroad" can it satisfy the function test of 45 U.S.C. §151, First.

The repair and maintenance which Delpro performs do *not* in any manner directly involve any "property transported by railroad." The decisions of the NMB, the District Court and the Court of Appeals all ignore the fact that the plain language of the statute requires that the "carrier" be involved with property either during, or immediately before or after, the time it is transported by a railroad. The list of services in section 151, First, makes it clear that *only* in those limited cases where a subsidiary is involved with "property transported by railroad" can it be considered a carrier. Thus, under the explicit provisions of the statute, Delpro does not fall within the function test and, therefore, cannot be found to be a "carrier."

III. By Determining that Delpro Is a "Carrier" for the Purposes of the Railway Labor Act, the Court of Appeals Decided an Important Question of Federal Law in a Manner Which Conflicts with the Legislative History of the Act and with Applicable Decisions of this Court.

The Court of Appeals incorrectly believed that the "evident intent" of the statute was to cover those companies performing the services which Delpro performs. Had the Court examined the statute's legislative history, however, it would have discovered that the draftsman intended to limit the RLA's coverage to subsidiaries of railroads engaged in transportation service within the meaning of the Interstate Commerce Act. Under this Court's decisions, Delpro is plainly not engaged in such service.

The only support which the Court of Appeals gives for its view of the RLA's intent is its conclusory statement that "[i]t is clear that the statute means to extend the definition of 'carrier' past those involved in the transportation of property by railroad to those also involved in the receipt, delivery, elevation, etc. of that property." App. A-12. Delpro agrees with the conclusory statement, but denies that this conclusion may be used to extend the definition of "carrier" to Delpro, a company concededly *not* involved in the actual transportation of property transported by railroad or in any one of the various services specified in this section of the RLA. While the Court of Appeals found Delpro's interpretation of the statute "somewhat plausible," the legislative history and applicable decisions of this Court make it clear that Delpro's interpretation is more than merely plausible, but rather that it is correct.

When a statute is plain and unambiguous, the Court ordinarily need not look to the legislative history of the statute.[24] As was discussed in Section II, *supra*, Delpro believes that 45 U.S.C. §151, First, is clear on its face and that it does not apply to Delpro. Despite this clarity, the Court of Appeals found that there are two plausible interpretations of 45 U.S.C. §151, First. Therefore, it becomes necessary to examine the legislative history of the RLA to determine the correct interpretation, and the legislative history of section 151, First, makes it clear that Delpro's interpretation of the statute is the correct one.

Only those express companies, sleeping car companies and carriers by railroad which were subject to the Interstate Commerce Act were "carriers" under the RLA as it was originally enacted in 1926. App. A-56. Since Delpro is not a a carrier subject to the Interstate Commerce Act, it clearly would not have been subject to the

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24. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n. 29, (1978).

RLA in 1926. The RLA's definition of "carrier" was broadened to its present scope by the amendments to the Act made in 1934.[25]

Congress asked Joseph Eastman, Federal Coordinator of Transportation, to help develop proposals to amend the RLA. The initial proposal for an amended definition of "carrier" presented by Eastman to the Senate Interstate Commerce Committee included "*any company* operating any equipment or facilities or furnishing any service included within the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce Act . . ."[26] Some Committee members were concerned that the proposed definition, by including everything within the definitions of "railroad" and "transportation," would be too broad. They were looking for a more limited definition of carrier.[27]

Eastman returned at a later date with the proposed definition which was subsequently enacted in all relevant parts.[28] Eastman explained that the definition of "carrier" was limited to carriers and their subsidiaries in order to avoid any conflicts with the National Industrial Recovery Act[29] codes. He additionally explained that the language in the new proposal was "some of the language in the Interstate Commerce Act."[30] Eastman reiterated

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25. This broadening was not one of the principal amendments to the RLA. The two fundamental changes made in 1934 were the proscription against company unions (45 U.S.C. §152, Fourth) and the provision of a neutral referee on adjustment boards (45 U.S.C. §153, First). 67 Cong. Rec. 1175 (1934).

26. *To Amend the Railway Labor Act-Hearings on S. 3266 before the Senate Committee on Interstate Commerce*, 73rd Cong., 2d Sess. 1 (1934) (emphasis added).

27. Id. at 11-12.

28. The only change between the definition proposed and the definition enacted was the addition of the parenthetical excluding "trucking service." This change is not relevant to the current controversy.

29. 48 Stat. 195 (June 16, 1933).

30. *To Amend the Railway Labor Act, supra* at 145-46.

this latter point to the House Committee on Interstate Commerce stating:

> One of the most difficult things about this bill is to arrive at a proper definition of the term "carrier" . . . [A] satisfactory compromise would be *to limit the definition* to railroads . . . and the subsidiaries which they control which are engaged in *transportation service recognized by the Interstate Commerce Act.*

Railway Labor Act Amendments — Hearings on H.R. 7650 before the House Comm. on Interstate and Foreign Commerce, 73d Cong. 2d Sess. 17-18 (1934) (emphasis added).

These statements by Mr. Eastman are entitled to a great deal of weight in interpreting the provision he drafted. As this Court has previously noted in connection with the interpretation of the RLA, statements of a drafter are entitled to great weight in the interpretation of the drafted provision.[31] Thus, as the legislative history outlined makes clear, the language which was eventually enacted is the result of a compromise limiting the scope of the initially proposed amendment which had included all that was under the Interstate Commerce Act. The definition that was finally approved and incorporated into the Act was itself taken from the definitions of the Interstate Commerce Act. Principally, what was left out were those facilities under the broad definition of "railroad" and those services performed by independent companies. What was included was essentially the definition of "transportation" as it then appeared in the Interstate Commerce Act. *Compare* 45 U.S.C. §151, First, and former 49 U.S.C. §1(3).[32] App. A-56, A-57. The in-

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31. *Chicago & North Western Railway Co. v. United Transportation Union*, 402 U.S. 570, 576 (1971). *See also Summit Airlines v. Teamsters Union No. 295*, 628 F.2d 798, 791 (2d Cir. 1981).

32. There are two differences between these provisions: "ventilation" is included only in the Interstate Commerce Act list while

corporated provisions of the Interstate Commerce Act refer only to those services incident to the transportation of property while it is being transported. Each of the services in the list concerns what is done to property once it is in the hands of the railroad; they are "terminal services" and services performed en route, and include the receiving, transporting, handling and delivering of property as well as its storage, refrigeration and icing.

As the legislative history makes clear, the definition in the RLA not only was lifted from, but was limited to, services "recognized by the Interstate Commerce Act." In construing a statute whose language was similarly drawn from another act, this Court has stated that there "is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged."[33] In a similar vein, the D.C. Circuit Court of Appeals stated that "[a]bsent evidence to the contrary words or phrases taken from prior legislation will be given the same meaning."[34] Thus, the Third Circuit Court of Appeals should have looked to cases interpreting the term "transportation" as it appeared in the Interstate Commerce Act.

The cases relating to the Interstate Commerce Act make it clear that "transportation" is limited to the move-

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"transportation" appears only in the RLA list. The reason for the omission of "ventilation" from the RLA is not readily apparent but would seem irrelevant since Delpro does not perform ventilation services. "Transportation" would not appear in the list in the Interstate Commerce Act since these services were part of the definition of "transportation". The term was likely added to the list in the RLA since it did not appear elsewhere in the definitional sections of the RLA.

The definition of "transportation" in the Revised Interstate Commerce Act, 49 U.S.C. §10102(24)(B), is slightly different from the definition as it appeared in 1934. App. A-57. However, the changed definition was a result of the revision and codification of the act which was meant to be without substantive change. Revised Interstate Commerce Act, Title 49, U.S.C.A., p. iii.

33. *United States v. C.I.O.*, 335 U.S. 106, 112 (1947).

34. *United Shoe Workers of America, AFL-CIO v. Bedell*, 506 F.2d 174, 183 (D.C. Cir. 1974) (citation omitted).

ment of freight and to the provision of services at either end of the movement. In *Pennsylvania Railroad Co. v. Public Utilities Comm.*, 298 U.S. 170, 175 (1936), this Court stated that for the purposes of the Interstate Commerce Act, "transportation begins . . . when the merchandise has been placed in the possession of a carrier." Similarly, in *Southern Railway Co. v. Reid*, 222 U. S. 424, 440 (1912), this Court stated that transportation means the physical instrumentalities as well as services connected with the "receipt, delivery and handling of property transported." Both of these cases involved the transportation of property: the first concerned rates in switching certain carloads of coal, the second concerned a penalty for refusing to accept a tender of certain goods.

The limited definition of "transportation" found in the Interstate Commerce Act is to be expected since it was designed to regulate "the relations between carrier and shipper" as well as to secure "adequate nondiscriminatory transportation."[35] Delpro clearly does not provide any service which a carrier provides to a shipper and, therefore, does not provide any "transportation service" as defined in the Interstate Commerce Act.

The function test under the RLA must be limited in the same manner that "transportation" has been limited under the Interstate Commerce Act. Under such a limited definition, it is clear that Delpro is not a "carrier," and it is clear that in holding Delpro to be a "carrier" the Court of Appeals has ignored both the legislative history of the RLA and applicable decisions of this Court.

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35. *Midstate Horticultural Co. v. Pennsylvania Railroad Co.*, 320 U.S. 356, 361 (1943). *See also United States v. Baltimore & Ohio Railroad Co.*, 333 U.S. 169 (1947); *Consella v. Norfolk & Western Railway Co.*, 381 F.2d 473 (4th Cir. 1967).

IV. The Court of Appeals Decided an Important Question of Federal Law Contrary to the Congressional Purpose Discernible from the Face of the Statute.

A statute such as the RLA must be interpreted in light of the intent of Congress in passing the act.[36] The RLA on its face makes it clear that one of the main purposes of the statute was to "avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. §151a. It has long been recognized that the "almost interminable" process mandated by the RLA was designed to force agreements between employers and unions in order to prevent interruption of commerce.[37] It was thought that these procedures would stabilize labor relations and avoid the bloody conflicts which immediately preceded the passage of the RLA.[38]

The RLA was originally passed in 1926, a time when the federal government employed a policy of *laissez faire* with regard to labor relations. There was no law generally regulating labor relations until the NLRA was passed in 1936.[39] The RLA was designed to be limited in its application — limited to the "railroad world" and its essential adjuncts.[40] It is this limited purpose which led the Ninth Circuit Court of Appeals to hold: "The purpose of the restrictive provisions of the Railway Labor Act is to keep transportation moving."[41]

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36. *Feaster, supra*, 410 F.2d at 1369.

37. *United Transportation Union v. Long Island Rail Road Company*, ____ U.S. ____, 50 L.W. 4315, 4318 (1982); *Detroit and Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142 (1969).

38. For a description of this conflict, see *United States v. Railway Employees' Dept. of the A.F. of L.*, 290 F. 978 (N.D. Ill. 1923).

39. Even the NLRA as originally enacted only regulated employer conduct. It was not until the Labor Management Relations Act of 1947, 61 Stat. 136 (June 23, 1947), that a comprehensive scheme of federal laws regarding labor relations was enacted.

40. *Feaster, supra*, 410 F.2d at 1369 (n. omitted.)

41. *Pan American, supra*, 324 F.2d at 220.

In *Jackson v. Northwest Airlines, supra*, the court ruled that the Fair Labor Standards Act ("FLSA")[42] was remedial in nature and that its exemption for those covered by the RLA needed to be strictly construed.[43] The court in *Pan American, supra*, noted that, like the FLSA, the NLRA was generally applicable with only the railroad industry having been carved out of its coverage. Thus, the court believed that the exemption in the NLRA must similarly be strictly read.[44]

The various courts which have focused on this limited scope of the RLA have looked at the relationship of the activity involved to the movement of persons and property.[45] The NMB, District Court and Court of Appeals in this case all assumed that the activities of Delpro's employees were essential to the continued transportation movement, and that an interruption in the services which Delpro provides would cause an interruption to commerce. Yet no detailed factual findings were made to see if this were truly the case.

Indeed it appears that a stoppage at Delpro would have little effect on the operations of the railroad carriers which allegedly control it. The types of repairs which Delpro performs require that the cars being worked on be out of service for a significant amount of time. (Running repairs are normally performed by the individual railroads.) Additionally, the repairs to be performed are scheduled on a ten year plan. App. A-18. Thus, it is clear that even if Delpro were shut down by a protracted strike there would be no immediate threat to the interstate movements of any railroads.[46]

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42. 52 Stat. 1060 (June 25, 1938), as amended.

43. At the time, the FLSA contained an exemption similar to that found in the NLRA. This exemption no longer exists and the wage and hour standards of the FLSA are now generally applicable to all employers. 29 U.S.C. §203(d).

44. *Pan American, supra*, 324 F.2d at 223.

45. *Feaster, supra; Pan American, supra; Jackson, supra.*

46. The decision of this Court in *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937), cannot truly be read to the contrary. The case was decided in the District Court in 1935 be-

TTX has no contract with Delpro requiring the performance of any work by Delpro. App. A-18. In the event of a strike or other emergency, independent repair shops would be available to perform work that might otherwise be performed by Delpro. There is some doubt whether striking Delpro employees could picket independent repair shops given the NLRA's prohibition against secondary boycotts. 29 U.S.C. §158(b)(4). There is even more doubt whether the employees would be allowed to picket individual railroads.[47] Indeed, in this instance, the NLRA affords protection which might prevent interruptions in service better than the RLA. While the NLRA would prohibit secondary boycotts of the railroad carriers at any time, the RLA would not prohibit such secondary pressure once the mandatory mediation had taken place.[48] Additionally, if it appeared that a stoppage at Delpro was going to interrupt rail transportation, the President could invoke the emergency injunctive powers granted him under the NLRA (29 U.S.C. §§178, 179) as easily as he could under the RLA (45 U.S.C. §160).[49]

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fore the Wagner Act was enacted. At the time this Court decided the case, it had not yet decided how broad the scope of the commerce power was. The court in *Pan American, supra*, 324 F.2d at 221-22, noted that the Supreme Court was

> dealing with a question, not of statutory interpretation, not of deciding whether one federal statute rather than another was applicable to these back-shop employees, but whether the federal Commerce Power was broad enough to permit Congress to regulate these back-shop labor relations at all . . . [A]t the time of the decision in Virginian it was necessary to show the substantial tangible relation between the back-shop work and the movement of trains in commerce, in order to satisfy the then existing requirements of constitutional doctrine.

47. *See generally*, Gorman, *Basic Text on Labor Law*, Ch. XII (1976).

48. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, *reh. denied*, 394 U.S. 1024 (1969).

49. The addition of these emergency powers under the NLRA is a further reason why the RLA does not need to read expansively.

Not only are the concerns that interruptions in service at Delpro would cause interruptions in carrier service unfounded, but these concerns are also irrelevant. The fact that a strike at Delpro could spread should not be the controlling factor in determining the application of the RLA. Such an interpretation would give the RLA almost unlimited scope.[50] This is clearly *not* intended by the statute. The RLA is meant to have a very limited scope — a scope limited to those operations whose interruption would cause an interruption in railroad transportation service. The Court of Appeals, by deciding that Delpro is a carrier subject to the RLA, has expanded the scope of the RLA contrary to the clear intent of the statute.

V. The Decision of the National Mediation Board Should Have Been Overruled for Failing to Clearly Set Forth the Grounds for its Departure from Prior Decisions.

The decision of the NMB that Delpro is a "carrier" is a departure from its previous holdings. This departure is clearly indicated in its denial of Delpro's Petition for Reconsideration when it held:

> To the extent that *Great Lakes* may be read to stand for the proposition tht [sic] the Board will not exercise jurisdiction over subsidiaries of carriers and over the subsidiaries' employees, the determination in *Great Lakes* is hereby overruled. Furthermore, the Board finds that *Eastern Aviation Services* is distinguishable from the instant case, in that EAS was not providing equipment or services integrally-related to the parent corporation's business. Delpro and TTX, on the other hand, perform work which is vital to the carriers' business.

App. A-32. Nowhere does the NMB set forth any reasons why *Great Lakes* must be overruled, or how the mainte-

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50. *Jackson, supra,* 70 F. Supp. at 513.

nance services in *Eastern Aviation Services* are distinguishable from those provided by Delpro.

There does not appear to be any in-depth factual findings on whether the services provided by Delpro are vital to the continuation of any railroad carrier's business. Indeed, it appears that these services are not vital.[51] The NMB's only attempted explanation for its change in policy is that it "has undertaken an extensive evaluation of its jurisdictionai standards. Recent jurisdictional determinations of [the NMB] have been made in light of changing corporate relationships and increasing use of contractors to perform work integral to rail and air transportation." App. A-31. However, the NMB does not set forth the results of its "extensive evaluation" nor the "changing corporate relationships" which have necessitated this change.

It is well settled that an administrative agency such as the NMB may depart from the norms and principles which it has previously set forth. But, as the Eleventh Circuit recently held in *McHenry v. Bond*, 668 F.2d 1185, 1192 (11th Cir. 1982):

> This does not mean, however, that an agency may abandon its own precedent without reason or explanation. 'An agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent.' *Mississippi Valley Gas Co. v. FERC*, 659 F.2d 488, 506 (5th Cir. 1981).

If an administrative agency is allowed to proceed without adequately explaining the basis of its actions, then the judicial review guaranteed by the Administrative Procedure Act[52] becomes meaningless. Thus, this Court has held:

> There is, then, at least a presumption that those [congressional] policies will be carried out best if the settled rule is adhered to. From this presumption

51. *See* discussion in Section IV, *supra*.
52. 5 U.S.C. §§704, 706 (2)(a).

> flows the agency's duty to explain its departure from prior norms. The agency may flatly repudiate those norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy. Or it may narrow the zone in which some rule will be applied because it appears that a more discriminating invocation of the rule will best serve congressional policy . . . *Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action* . . .

Atchison, Topeke & Santa Fe Railway Co. v. Board of Trade, 412 U.S. 800, 808 (1973) (citation omitted) (emphasis added). Without such an explanation, the reviewing court cannot determine whether the agency's action was arbitrary or capricious.[53]

The decision by the NMB certainly does not adequately set forth the basis of its departure from prior decisions. Moreover, the District Court's finding that the NMB decision reflects consideration of the relevant factors is unsupported. There is no explanation as to why control must no longer be considered, or why various factors previously used to indicate control no longer need to be considered. Additionally, the NMB made no findings as to whether the services which Delpro provides are essential to the continuous operations of any railroad carriers. Indeed, if the NMB had considered the relevant factors, it would have had to determine that Delpro does not meet the function test and is not a "carrier."[54] Since the NMB did not adequately set forth the basis of its decision or the reason for its departure from prior decisions, the District Court and the Court of Appeals improperly affirmed its findings. Therefore, the decisions of those courts must be reversed.

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53. *McHenry, supra*, 668 F.2d at 1193.
54. *See* discussions in Sections I-IV, *Supra*.

CONCLUSION

For all of the reasons set forth above, Petitioner Delpro Company respectfully requests that a writ of certiorari be issued to review and to reverse the Judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Date: August 12, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2475

DELPRO COMPANY

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL LODGE OF BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; and NATIONAL MEDIATION BOARD OF THE UNITED STATES OF AMERICA

(D.C. Civil No. 81-103)

JOHN TAYLOR, individ. and as representative of Delpro Company, DAN LENTZ, individ. and as representative of Delpro Co., DAN MILLER, individ. and as representative of Delpro Co.

v.

JACK WEATHERLOW, individ. and Vice Chairman, Brotherhood Railway Carmen Local Affiliate

(D.C. Civil No. 81-106)

DELPRO COMPANY,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Argued April 2, 1982

Before: GIBBONS, SLOVITER and BECKER,
Circuit Judges

(Filed April 13, 1982)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

This appeal arises out of a labor dispute involving a wholly owned subsidiary of a company which is itself owned primarily by a group of railroad companies. Based upon this corporate relationship and the services performed by the appellant, the district court found it to be a "carrier" as defined in the Railway Labor Act, 45 U.S.C. §151 *et seq.*, and thus subject to the jurisdiction of the National Mediation Board. We affirm.

I.

On August 20, 1980, the Brotherhood Railway Carmen of the United States and Canada (BRC) requested that the National Mediation Board (NMB) investigate a dispute concerning the representation of employees at Delpro Company (Delpro). Before determining the representation issue, the NMB issued a Determination of Jurisdiction on October 1, 1980, in which it found Delpro to be a carrier within the meaning of the Railway Labor Act and thus subject to its jurisdiction. 8 NMB No. 2 (1980). Two weeks later the NMB denied a Delpro petition for reconsideration, 8 NMB No. 16 (1980), and later proceeded to conduct an election among certain of Delpro's employees that resulted in NMB certification of the BRC as their representative.

Following the denial of the petition for reconsideration, Delpro brought suit in the United States District Court for the District of Delaware seeking declaratory and injunctive relief against the NMB. After first denying the NMB's contention that it lacked subject matter jurisdiction to review the NMB's determination of jurisdiction, the court dismissed the action for failure to join the BRC as defendants. *Delpro Co. v. National Mediation Bd.*, 509 F. Supp. 468 (D.Del. 1981). Delpro sued again, on March 11, 1981, joining the BRC and

seeking to set aside the NMB's certification of BRC. The following day the BRC filed a separate action to enjoin Delpro from refusing to bargain in good faith. Following consolidation of these actions, the district court, on August 7, 1981, granted summary judgment in favor of the BRC declaring Delpro to be a carrier. *Delpro v. Brotherhood Ry. Carmen*, 519 F.Supp. 842 (D.Del. 1981). On August 28, 1981, it enjoined Delpro to bargain with the BRC. This appeal by Delpro followed.[1]

II.

Both the NMB and the BRC argued in district court, and urge here, that the NMB's determination of its own jurisdiction in this case is not reviewable. The district court rejected that argument, 509 F.Supp. at 472-75, and we do also. Whatever the limitations may be upon judicial review of NMB decisions concerning the division of employees into appropriate classes or crafts or concerning the selection of a ballot for use in a representation election,[2] judicial review of NMB decisions concerning its own jurisdictional authority is not barred. *International Longshoremen's Ass'n v. North Carolina Port Authority*, 463 F.2d 1, 3 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); *United States v. Feaster*, 410 F.2d 1354, 1361-62 (5th Cir.), *cert. denied*, 396 U.S. 962 (1969). Although statutory policy may preclude review of determinations necessarily incident to the NMB's undisputed duty to resolve representation disputes, a decision concerning the Board's own statutory power to act

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1. Motions by Delpro to stay the injunction pending appeal were denied by the district court on September 4, 1981, and by this court on September 27, 1981.

2. *See* Brotherhood of Railway and Steamship Clerks v. Ass'n for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965); Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943).

at all should be subject to review absent some clear statutory prohibition.[3] We also agree with the district court, 519 F. Supp. at 845-46, that if the NMB looked to the relevant factors in the administrative record, the court should not disregard the Board's conclusions.[4] And although the court has the power to apply its own interpretation of the statute, the construction of the statute by the administering body charged with administering it is generally entitled to deference.[5] We add only that such deference is not necessarily due when the administrative agency has taken inconsistent positions in the past or when an agency is determining the scope of its own jurisdiction.[6]

III.

The first two general purposes enumerated in the Railway Labor Act are:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; . . .

45 U.S.C. §151a (1976). Disputes arising among a carrier's employees as to who represents such employees in labor negotiations are to be investigated and resolved by the NMB. 45 U.S.C. §152, Ninth. Since the Act applies

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3. *See* 5 U.S.C. §§701-02 (1976) (provisions of Administrative Procedure Act concerning judicial review of agency action and individual rights to such review).

4. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414-16 (1971).

5. *E.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582, 598 (1981).

6. National Industrial Sand Ass'n v. Marshall, 601 F.2d 689, 698-99 n.32 (3d Cir. 1979).

only to carriers, any company subject to NMB's jurisdiction must fall within the definition of "carrier." That definition reads, in relevant part:

> The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body judicial or otherwise, when in the possession of the business of any such "carrier": . . .

45 U.S.C. §151, First.

Delpro advances three reasons why it should not be found a carrier subject to the jurisdiction of the NMB: (1) the statute's use of "carrier" in the singular form excludes companies that are owned or controlled by a group of carriers; (2) ownership *or* control shall be read as ownership *and* control, and Delpro is not in fact so controlled; and (3) Delpro's services do not satisfy the function requirement of the statute. We discuss each of these contentions in turn.

A.

Delpro is one of four wholly owned maintenance subsidiaries of the Trailer Train Company, and its business operations are limited to repair of railroad cars owned by Trailer Train. The stock of Trailer Train is in turn owned by twenty-nine operating railroads, the trustees of two former operating railroads and one freight forwarding company. Trailer Train was originally

formed, and still functions, as an owner of a pool of railroad flatcars that are leased only to Trailer Train shareholders. Nearly all of the directors of Trailer Train are senior officers of the railroads owning the stock of Trailer Train. Its car contracts with the railroads assign the responsibility for maintenance of the leased equipment to Trailer Train — maintenance done in substantial part by Delpro and Trailer Train's other maintenance subsidiaries.

Since the stock of Trailer Train is held almost entirely by railroad companies indisputably qualifying as carriers, the district court concluded that Delpro is indirectly owned by a group of carriers by railroad and that such ownership by more than one carrier falls within the meaning of the statute. 519 F. Supp. at 847-48. The statute governing construction of federal statutes, 1 U.S.C. §1, both in its present version and in the version in effect when the Railway Labor Act was enacted, permits singular words to be read to include the plural unless there is some contrary indication in the context.[7] That rule of construction is especially apt when such interpretation is necessary to carry out the obvious congressional intent. Delpro points to other provisions of the Act that employ both the singular and plural of "carrier" as evidence that Congress intended only the singular in the provision at issue here.[8] These provisions, however, concern the representation of, disputes among, and agreements

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7. The present version states, "In determining the meaning of any Act of Congress, unless the context indicates otherwise — words importing the singular include and apply to several persons, parties, or things; . . ." Before 1947, it stated, "In determining the meaning of any Act or resolution of Congress, words importing the singular may extend and be applied to several persons or things; . . ." See First National Bank v. State of Missouri, 263 U.S. 640, 657 (1924).

8. See 45 U.S.C. §§151, Sixth; 152, Second, Sixth, Ninth, and Eleventh.

between carriers and their employees — not relationships of ownership or control. That Congress elsewhere contemplated the possibility of groups of carriers having representation and labor problems in common does not suggest that Congress also contemplated — and deliberately excluded — the possibility of ownership or control of a company by a group of carriers. We agree, to the contrary, with the district court, 519 F.Supp. at 848, that the Act's purpose of avoiding interruption of the operations of carriers would not be furthered by the reading of "carrier" suggested by Delpro. Excluding a company indirectly owned or controlled by a group of carriers while including companies indirectly owned or controlled by a single carrier simply makes no sense, since the potential for disruption to commerce by rail could be as great or even greater in the former case.

B.

Delpro also contends that despite the Act's definition of "carrier" as "any company which is directly or indirectly owned *or* controlled by . . . any carrier" (emphasis supplied), actual exercise of control is necessary — *i.e.*, "or" should be read "and." In support Delpro has cited two earlier NMB decisions that look to factors beyond mere ownership such as the degree of integration between the activities of the parent and subsidiary companies and whether the employees of a subsidiary are employees of the parent. *Eastern Aviation Services, Inc.*, 5 NMB 53 (1970); *Great Lakes Airlines, Inc.*, 4 NMB 5 (1961).

It is indeed the case that these decisions reject mere ownership (direct or indirect) as a sufficient condition to satisfy the "owned or controlled" requirement for NMB jurisdiction. This NMB precedent on the jurisdictional reach of the Act, however, is no bar to a reading of the statute by the district court and by this court according

to its plain meaning. After finding that Delpro is indirectly owned by a group of carriers by railroad, the district court went on to consider "the alternative test of being controlled by a group of carriers by railroad," 519 F.Supp. at 848, and concluded that this test was also satisfied. Since we likewise view the tests of ownership and control as truly alternative tests, we need not consider the question of exercise of control.

C.

The final barrier to NMB jurisdiction suggested by Delpro is that the repair and maintenance work done by Delpro employees does not satisfy the function test found in 45 U.S.C.§151, First: "and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad." As Delpro would have us read this language, a carrier must perform a service with respect to some preliminary or subsequent stage of handling property to be transported by railroad — *i.e.*, the transportation or receipt or elevation or storage, etc. of that property *before* or *after* it is transported by railroad. According to Delpro, the district court's description of the function test as "the performance of a service in connection with the transportation of property by railroad." 519 F.Supp. at 848, in effect ignores the statutory mandate that Delpro must itself be directly involved in the transportation, receipt, elevation, storage, etc. of the property to be transported by railroad. Appellant's Brief at 30-34.

This parsing of the statutory language is somewhat plausible, but we cannot overlook the evident intent of the statute. The use of both "transportation" and "transported" cannot be meant to exclude those performing such essential services as repair work connected with

the transportation of property by railroad.[9] It is clear that the statute means to extend the definition of "carrier" past those involved in the transportation of property by railroad to those also involved in the receipt, delivery, elevation, etc. of that property. The inclusion of these other jobs along with that of transportation itself evidently required the inclusion of the word "transported" to make the intent clear — *e.g.*, services in connection with the receipt of property transported by railroad. Had it not been for the inclusion of these other job categories, the redundancy of "transportation . . . of property transported by railroad" would undoubtedly have been eliminated.

Thus, we endorse the district court's reasoning that inasmuch as maintenance workers employed directly by a carrier would unquestionably be covered by the Railway Labor Act, so also should those workers employed by a subsidiary such as Delpro that is indirectly owned by a group of carriers. 519 F.Supp. at 848-49.

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9. *Cf.* Despatch Shops, Inc. v. Railroad Retirement Board, 153 F.2d 644 (D.C. Cir. 1946) (maintenance subsidiary of railroad company found to perform vital service "in connection with transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad," for purposes of defining an "employer" under the Railroad Unemployment Insurance Act, 45 U.S.C. §351). It is instructive to note the inclusion of "passengers" in this definition necessitated separating the job of transportation from the jobs of receipt, delivery, etc. in wording the statute. In so doing, Congress took the opportunity to place "property" in the same phrase as "passengers," thereby eliminating the redundancy found in the Railway Labor Act.

11

IV.

The judgment appealed from will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

OPINIONS BELOW

MEDIATOR'S REPORT

CASE NO. CR—5031

Title *Representation-Carmen (mechanics), employees of Delpro Company. Applicant-BRC*

Fredericksburg, Va.
Sept. 10, 1980

Number of employees involved 137

Application Dated	August 20, 1980
Case Docketed	August 27, 1980
Date Case Assigned to Board Representative ..	September 2, 1980
Place Case Set	Bear, Delaware
Date Case Set	September 9, 1980
Commenced Handling	September 9, 1980
Craft or Class	Carmen (mechanics), Apprentice & Helpers
Incumbent	None
Applicant	BRC
Carrier	Delpro Company
Representatives:	
Delpro Company	Ray Schoonhoven, Attorney Seyfarth, Shaw, Fairweather & Geraldson
BRC	A.F. D'Avanzo, Grand Lodge Deputy

Dominic Maiese, National Representative, and, Wm. H. Harker, Jr., Regional Director, of the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, were also present for the meetings of 9-9-80. It is not their intention to intervien. They merely wanted to enter a position on the record so to speak; that position being that the NMB did not have jurisdiction.

SEPTEMBER 9, 1980:

Meetings were held this day with the above named reps of the Company, BRC and IUMSW of A at the Company's office in Bear, Delaware.

The primary question for this investigation is whether or not the NMB has jurisdiction. While on the property, all procedures necessary to conduct an election if warranted were completed.

Delpro Company is a wholly owned subsidiary of Trailer Train Company.

Mediator Samuel J. Cognata

(Continued)

MEDIATOR'S REPORT (Pg. 2)

CASE NO. CR—5031

Title *Representation-Carmen (mechanics), employees of Delpro Company. Applicant-BRC*

Washington, D.C.
Sept. 10, 1980

Number of employees involved _____

Trailer Train Company (TTX) owns and leases a fleet of various types of railroad flat cars. TTX has six wholly owned subsidiaries, two of which also own and lease freight cars. They are Railbox Company and Railgon Company. There are four subsidiaries whose sole function is to maintain and repair the freight cars owned by TTX, Railbox and Railgon. TTX also contracts out repair work to more than thirty (30) independently owned shops. These four companies are Delpro Company, Calpro Company (located in Mira Loma, La.), Hamburg Industries, Inc. (located in Hamburg, S.C.), and Acorn Industries, Inc. (located in Jacksonville, Fla.) All the above were incorporated in the State of Delaware.

TTX is owned by thirty-one (31) railroads and Transway International Corporation which is a freight forwarding company. The Board of Directors of TTX is composed of 44 senior level officials of the owning carriers. These officials also serve on the boards of directors for all of the subsidiaries. The officers of TTX, specifically the President and Vice Presidents of Finance, Equipment and Fleet Management, and, the General Council, serve in similar capacities with the subsidiaries. None of these officers are affiliated with a railroad.

Although separate financial data is kept for TTX and each subsidiary, a consolidated balance sheet is published in the annual report of the TTX which is prepared by Peat, Marwick, Mitchell & Co., C.P.A.'s, Chicago, Illinois. An expansion program currently underway at Delpro is being financed by $1,000,000.00 in revenue

bonds issued by the State of Delaware. However, the $18,000,000.00 used to establish Delpro in 1979 was TTX money.

The Management Service Division of TTX assigns repair work to subsidiaries. There is no specific contract between TTX and any subsidiary for such work but, all maintenance and modification programs are planned for ten years forward by TTX. Additionally, light repairs are normally performed, as per AAR standards, by the railroads using the cars at the time such repairs are needed.

There is no doubt that the work in question, the maintenance and repair of freight cars, is work usually done by carmen on railroads, and, if done by a carrier, would certainly be work subject to the Railway Labor Act.

Mediator Samuel Cognata

(Continued)

MEDIATOR'S REPORT (Pg. 3)

CASE NO. CR-5031

Title *Representation-Carmen (mechanics), employees of Delpro Company. Applicant-BRC*

Washington, D.C.
September 10, 1980

Number of employees involved _____

There are no unions representing employees of TTX proper. Two of the repair subsidiaries, Hamburg Industries and Calpro Company, have units of production and maintenance employees represented under NLRB certifications by the IBT and the USWA, respectively. There is also another company in the Bear, Delaware, area, P&R Railcar, Inc., a division of North American Car Company, doing the same work as Delpro, which has a similar NLRB certification.

The Board has clearly stated that neither decisions by the I.C.C. or R.R.B., regarding what is a carrier and thus, whose employees are covered by each respective law, are not controlling under the Railway Labor Act. The facts relative to Delpro are that its employees are covered by Railroad Retirement Act. As to the I.C.C., TTX only reports to it pursuant to a pooling order (I.C.C. Finance Docket #27589 and Docket #27590), only its rates; and this is for informational purposes. TXX, in the pooling order, is specifically noted not to be a carrier.

In summation, TTX does not operate as a carrier by rail. It merely owns and leases to rail carriers a fleet of freight cars. However, TTX is owned and controlled by thirty-one rail carriers which benefit directly by using TTX. For example, a railroad using a Railbox boxcar does so at a cost which, on the average, represents 25% of the railroads freight revenue dollar. That same car would cost an average of 52% of the freight revenue dollar if railroad owned.

The I.C.C. says TTX is not a carrier, yet the Railroad Retirement Board has covered its employees (and those of all its subsidiaries) under the Railroad Retirement Act.

Notwithstanding, existing NLRB certifications on certain TTX subsidiaries, there is a direct link between TTX and most of the major railroads. It is within the province of the Board to determine if there is sufficient basis, given the facts, to take jurisdiction.

Mediator Samuel Cognata

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

CASE NO. R-5146
(FILE NO. CR-5031)

DETERMINATION OF JURISDICTION

October 1, 1980

In the Matter of the Application of the

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA

alleging a representation dispute to exist pursuant to Section 2, Ninth, of the Railway Labor Act

DELPRO, INC.

On August 20, 1980, the Brotherhood Railway Carmen of the United States and Canada (BRC) filed an application pursuant to Section 2, Ninth, of the Railway Labor Act, as amended, 45 U.S.C. S152, Ninth, alleging the existence of a representation dispute involving employees of Delpro, Inc. (Delpro) denominated as "Carmen-Mechanic." Said application has been assigned NMB File No. CR-5031 for purposes of investigation.

At the time the application was received, these employees were not represented by any individual or organization.

During the course of the Board's investigation, issues arose concerning whether Delpro is a "carrier" within the meaning of the Act. On the basis of information received during the course of its investigation, including a field investigation, the Board finds as follows:

ISSUE

The issue before the Board is whether Delpro is a "carrier" within the meaning of Section 1, First, of the Act.

CONTENTIONS

Delpro contends that it is not a carrier within the meaning of the Act.

BRC contends that Delpro is a carrier.

FINDINGS OF FACT

I.

Delpro's sole business is repair and maintenance of railroad freight cars owned by Trailer Train Company (TTX), and two of TTX's wholly-owned subsidiaries, Railbox Company and Railgon Company. Delpro is located in Bear, Delaware.

II.

Delpro is aiso a wholly-owned subsidiary of TTX. In addition to Delpro, TTX owns three other companies which repair and maintain railroad freight cars: Calpro Company (Mira Loma, LA); Hamburg Industries, Inc. (Hamburg, SC); and Acorn Industries, Inc. (Jacksonville, FL).

III.

TTX owns and leases a fleet of various types of railroad flatcars and boxcars under a pooling arrangement sanctioned by the Interstate Commerce Commission (ICC) in Finance Docket Nos. 27589 and 27590, decided August 1, 1974.

IV.

TTX is owned by 31 railroads (all carriers within the meaning of the Railway Labor Act) and one freight forwarder. TTX's board of directors consists of 44 senior of-

ficials of the owning carriers, who also serve as directors of each of the subsidiaries.

The principal officers of TTX are also officers of Delpro. The officers are not employees of any of the owning carriers.

Employees of Delpro are covered by the Railroad Retirement Act.

V.

TTX was created as a means of increasing the availability of freight cars and reducing the costs associated with purchase, lease, repair, and maintenance of freight cars, through pooling of resources.

ICC approval was required because pooling is prohibited unless it will increase service to the public or economy of operation without unduly restraining competition.

When TTX was created, it financed car purchases through an agreement obligating the stockholders to accept joint and several liability for all payments; by requiring individual stockholders to purchase subordinated notes; and by subordinating TTX's obligations to its stockholders to its obligations to investors in its equipment securities.

Any "profit" earned by TTX is rebated pro rata to the stockholders, based upon the amount of business each stockholder transacted during the year. This is in line with the intention to provide cars at lowest-possible cost through pooling.

VI.

TTX is obligated to maintain all pool cars, and the railroads are prohibited from making more than ordinary running repairs.

VII.

Carriers must be stockholders in TTX to participate in the pooling arrangement, but need not be stockholders to participate in the Railbox pool.

VIII.

The ICC found that TTX was not a common carrier itself in its decision cited above.

DISCUSSION

Section 1, First, of the Railway Labor Act provides:

> The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and *any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad which operates any equipment or facilities or performs any service* (other than trucking service) *in connection with the transportation,* receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage and handling of property transported *by railroad,* and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": Provided, however, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line oper-

ated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to carrier where delivery is not beyond the tipple, and the operation of equipment or facilities therefor, or any of such activities. (Emphasis supplied)

II.

The Interstate Commerce Act (ICA) provides, in pertinent part:

(1) Carriers subject to regulation

The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

. . . . . .

From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States. (49 U.S.C. § 1 (1)

The term "carrier" is defined as:

The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping car companies; and all persons, natural or artificial, engaged in such trans-

portation as aforesaid as common carriers for hire. Whenever the word "carrier" is used in this chapter it shall be held to mean "common carrier." (49 U.S.C. S1(3) (a))

III.

It is apparent from the wording of these two statutes that the scope of the ICA is narrower than that of the RLA. Whereas the ICA contains a definition of "carrier", the RLA incorporates that definition and adds others. The Board therefore concludes that the ICC finding that TTX is not a carrier under the ICA, is not conclusive on the NMB if TTX meets any of the other possible definitions of the term "carrier" under the RLA.

IV.

TTX is directly owned and controlled by 31 carriers subject to both the ICA and the RLA. Officials of these carriers constitute its board.

TTX was created by these carriers in order to increase their available supply of railroad cars while lowering the cost of those cars. The alternative to creation of TTX was for each carrier to purchase and service additional cars.

Delpro is a wholly-owned subsidiary of TTX, whose only function is maintenance and repair of the cars owned by TTX. Officers of TTX are officers of Delpro.

V.

The Board concludes that both TTX and Delpro are carriers within the meaning of Section 1, First, of the RLA. Both are owned and controlled by rail carriers, either directly or indirectly. Both exist solely to facilitate rail transportation by supplying or maintaining equipment to be used by rail carriers, which equipment historically has been owned and maintained by rail carriers.

CONCLUSION

The Board has jurisdiction over Delpro, Inc. The application in File No. CR-5031 is hereby docketed as NMB Case No. R-5146.

A Board Representative will be assigned to complete the investigation.

By direction of the NATIONAL MEDIATION BOARD.

/s/ ROWLAND K. QUINN, JR.

Rowland K. Quinn, Jr.
Executive Secretary

cc: Mr. James E. Laramy
Mr. Ray J. Schoonhoven
Mr. O. W. Jacobson
Mr. Thomas A. Woodley
Mr. Anthony F. D'Avanzo

RKQ/dca

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

CASE NO. R-5146

DENIAL OF PETITION

October 15, 1980

In the Matter of the Application of the

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA

alleging a representation dispute to exist pursuant to Section 2, Ninth, of the Railway Labor Act

DELPRO, INC.

On August 20, 1980, the Brotherhood Railway Carmen of the United States and Canada (BRC) filed an application pursuant to Section 2, Ninth, of the Railway Labor Act, as amended, 45 U.S.C. S152, Ninth, alleging the existence of a representation dispute involving employees of Delpro, Inc. (Delpro) denominated as "Carmen-Mechanic". Said application was initially assigned NMB File No. CR-5031 for purposes of investigation, and has now been docketed as Case No. R-5146.

At the time the application was received, these employees were not represented by any individual or organization.

During the course of the Board's investigation, issues arose concerning whether Delpro is a "carrier" within the meaning of the Act. On the basis of information received during the course of its investigation, including a field investigation, the Board determined that Delpro, and its parent corporation Trailer Train Company (TTX) were "carriers" within the meaning of Section 1, First, of the Act. Determination of Jurisdiction, 8 NMB No. 2 (1980).

Immediately following issuance of the Board's Determination, counsel for Delpro requested that the Board

reconsider its Determination on account of alleged errors of fact and law, and requested a hearing on the question of the Board's jurisdiction. By letter dated October 2, 1980, Delpro was afforded the opportunity to present prima facie showing that the Board's Determination was erroneous. The Board reserved judgment on the necessity for holding a hearing pending receipt of such submission. (8 NMB No. 6)

Delpro filed its Petition for Reconsideration of Determination of Jurisdiction, including affidavits and supporting exhibits, on October 8, 1980. Such materials have been made part of the record in this case, and have been reviewed and considered.

I.

Delpro does not dispute any of the relevant facts found by the Board in its Determination. Delpro does point out that Delpro is independently administered on a day to day basis, and has its own labor relations policies.

Delpro asserts that the reason all of its business is with TTX is because TTX has given it a volume of work which utilizes all of Delpro's personnel and facilities.

Delpro asserts that the directors of TTX are primarily involved in authorization of equipment and financing, and that the stock-holders of TTX have "no voice in this or any other TTX matter", and "play no part in the establishment or administration of . . . management policies." Delpro further asserts that the relationship between TTX and its participating carriers is circumscribed by the terms of their contracts.

Finding no dispute as to the facts recited in the Determination of Jurisdiction, the only question is whether the additional facts asserted by Delpro are sufficient to warrant a change in the result reached in the Determination. With respect to the limit on Delpro's capacity to perform work or other customers, the reasons presented do not alter the basic fact that Delpro does 100% of its

business with TTX. No showing has been made that Delpro desires or seeks other customers, or is dissatisfied with the present arrangement, or would perform work *not* connected with rail transportation even if it had other customers.

The Board cannot ignore the legal and fiduciary obligations of a corporation's board of directors, or the rights of its shareholders. The board of TTX consists of senior officials of the shareholders-carriers. It is unrealistic to assume that those directors authorize contracts between TTX and their "home carriers" which are free market arms-length transactions, when the stated reason for creating TTX was to benefit the carriers financially. TTX is a captive of the railroads which own and control it.

The additional asserted facts present no grounds for reversing the Determination of Jurisdiction or conducting a hearing, and no showing of factual error on the Board's part has been made by Delpro.

II.

As an asserted error of law, Delpro states that the Board has not followed the procedures in S3.503-3 of the Representation Manual, which provides *procedural guidelines for Board Representatives* to aid them in conducting field investigations where jurisdiction is an issue. The Manual does not provide rules of law for determining jurisdiction; rather, it provides guidance to Board Representatives for use in gathering facts for consideration by the Board. The Manual is not binding upon the Board itself, as indicated by the Notice on the title page.

Because the Determination of Jurisdiction was made by the Board itself, and because the Board Representative properly utilized the procedures contained in the Manual in his investigation, this assertion by Delpro provides no basis for reconsideration.

III.

Relying upon *Great Lakes Airlines, Inc.*, 4 NMB 5 (1961) and *Eastern Aviation Services, Inc.* 5 NMB 53 (1970), Delpro asserts that the Board erred in finding that TTX and Delpro were carriers under the RLA, because it relied on "mere ownership" to find jurisdiction.

In *Great Lakes*, the Board declined to assert jurisdiction over a wholly-owned subsidiary of an airline which performed all of the airline's maintenance, and also performed maintenance for other carriers. In *Eastern Aviation Services*, the Board declined to assert jurisdiction over a wholly-owned subsidiary of Eastern Airlines, stating:

> It is the opinion of the Board that the appropriate test for Board jurisdiction in cases where a subsidiary operation is wholly-owned by a carrier concededly covered by the Railway Labor Act is the degree of integration between the activities of the subsidiary enterprise and its parent. Factors indicative of such integration would include the degree of commonality in the employment terms and conditions of the work forces involved, as well as the degree of autonomous direction of its own operations by the subsidiary. In this age of corporate conglomeration, the bare fact of ownership, standing alone, is not determinative of the jurisdictional question. (4 NMB at 55).

The Board has undertaken an extensive evaluation of its jurisdictional standards. Recent jurisdictional determinations of this Board have been made in light of changing corporate relationships and increasing use of contractors to perform work integral to rail and air transportation. Thus, in *Missouri-Illinois Central Industries, Ltd.*, 7 NMB No. 256 (1980), the Board found that a company which braced and secured freight in transit on railroads performed work subject to the Act. In *Ground Services, Inc. (San Diego)*, 7 NMB No. 266 (1980), the

Board found that a company which provided fleet service work for airlines performed work subject to the Act. In *Boeing Airport Equipment, Inc.*, 7 NMB No. 193 (1980), the Board found that a company which provided baggage handling to an airline performed work subject to the Act. In each case the Board examined the degree of control exercised by a carrier over an independent contractor.

In the instant case, Delpro asserts that there is no control, and that ownership is not determinative. Such an argument overlooks the duties of the board of directors, the directors' relationships to the stockholders, and the stockholders' motives in forming TTX.

It further overlooks the financial incentives to the carriers, who created a 90,000-car pool rather than buy and maintain their own rolling stock. The fact that available cars are directly related to the carriers' ability to transport freight shows how important TTX is to its owners.

To the extent that *Great Lakes* may be read to stand for the proposition that the Board will not exercise jurisdiction over subsidiaries of carriers and over the subsidiaries' employees, the determination in *Great Lakes* is hereby overruled. Furthermore, the Board finds that *Eastern Aviation Services* is distinguishable from the instant case, in that EAS was not providing equipment or services integrally-related to the parent corporation's business. Delpro and TTX, on the other hand, perform work which is vital to the carriers' business. *Chesapeake and Ohio Ry. Co.*, 4 NMB 215 (1962), also cited by Delpro, is likewise inapposite, since the Board found in that case that the subsidiary's main business was real estate development.

CONCLUSION

Based upon all of the foregoing, the Board finds that Delpro has failed to make a prima facie showing that the Determination of Jurisdiction was incorrect as a matter of fact or law.

After reconsideration of its Determination, the Board reaffirms its decision. Delpro's request for a hearing is denied.

By direction of the NATIONAL MEDIATION BOARD.

/s/ ROWLAND K. QUINN, JR.

Rowland K. Quinn, Jr.
Executive Secretary

cc: Mr. James E. Laramy
Mr. Ray J. Schoonhoven
Mr. O. W. Jacobson
Mr. Thomas A. Woodley
Mr. Anthony F. D'Avanzo

RKQ/dca

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

CASE NO. R-5146

CERTIFICATION

December 17, 1980

In the Matter of the

REPRESENTATION OF EMPLOYEES
of
DELPRO, INC.

Carmen, Helpers and Apprentices

The services of the National Mediation Board were invoked by the Brotherhood Railway Carmen of the United States and Canada, AFL-CIO-CLC (BRC), on August 20, 1980, to investigate and determine who may represent for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, personnel described as "Carmen, Helpers and Apprentices", employees of Delpro, Inc.

At the time this application was received, these employees were not represented by any organization or individual.

The Board assigned Board Representative Samuel J. Cognata to investigate.

FINDINGS

The investigation disclosed that a dispute existed among the craft or class of Carmen, Helpers and Apprentices, and by direction of the Board the Board Representative was instructed to conduct an election by secret ballot to determine the employees' representation choice.

The following is the result of the election as reported by Board Representative Roland Watkins, who was assigned to count the ballots in this case.

Number of Employees Voting:

	BRC	Any Other Org. or Individual	Number of Employees Eligible
Carmen, Helpers & Apprentices	103	1*	124

The National Mediation Board further finds that the Carrier and employees in this case are, respectively, a Carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the interested parties, as well as the Carrier, were given due notice of the Board's investigation.

CERTIFICATION

NOW, THEREFORE, in accordance with Section 2, Ninth, of the Railway Labor Act, as amended, and based upon its investigation pursuant thereto, the National Mediation Board certifies that the Brotherhood Railway Carmen of the United States and Canada, AFL-CIO, has been duly designated and authorized to represent for the purposes of the Railway Labor Act, as amended, the craft or class of Carmen, Helpers and Apprentices, employees of Delpro, Inc., its successors and assigns.

By order of the NATIONAL MEDIATION BOARD.

/s/ ROWLAND K. QUINN, JR.

Rowland K. Quinn, Jr.
Executive Secretary

*1 vote cast for William J. Kulick, Individual.

RKQ/dca

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 81-103/81-106
Consolidated

DELPRO COMPANY,

Plaintiff,

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, et al.,

Defendants.

ORDER

This 7th day of August, 1981, for the reasons stated in the accompanying Opinion issued this date,

IT IS ORDERED THAT:

1. Summary judgment shall be entered in favor of the National Mediation Board and the Brotherhood Railway Carmen of the United States and Canada on the issue of Delpro Company's status as a carrier under the Railway Labor Act.

2. The Brotherhood Railway Carmen and Delpro Company shall file within ten days an agreed proposed form of permanent injunction in accordance with the Court's Opinion. If Delpro Company and the Brotherhood Railway Carmen are unable to agree on a proposed form of permanent injunction, each shall file its own proposed form of permanent injunction and, within five days thereafter, a memorandum of not more than two pages explaining the deficiencies in its opponent's proposed form of permanent injunction.

/s/ MURRAY M. SCHWARTZ

United States District Judge

SCHWARTZ, District Judge

This case is a consolidation of two separate actions — one brought by Delpro Company ("Delpro") against the Brotherhood Railway Carmen of the United States and Canada ("Brotherhood Railway Carmen" or "BRC") and the National Mediation Board of the United States ("NMB" or "Board"), and another brought by the Brotherhood Railway Carmen against Delpro. Since both actions presented questions regarding Delpro's status as a "carrier" under the Railway Labor Act (the "Act"), they were consolidated pursuant to Rule 42(a) of the Federal Rules of Civil Procedure. Delpro is seeking a declaratory judgment that it is not a "carrier" under the Act, as well as injunctive relief, while the Brotherhood Railway Carmen seeks preliminary and permanent injunctive relief that would compel Delpro to recognize it as the representative of certain Delpro employees and to "treat", or bargain, with it as required by the Railway Labor Act.[1] Now before the Court are motions for summary judgment filed by the NMB and the Brotherhood Railway Carmen in the action brought by Delpro, and a motion for a preliminary injunction originally sought by the Brotherhood Railway Carmen in the action it filed. In addition, Delpro has filed with its brief in opposition to the summary judgment motions of the NMB and the BRC its own cross-motion for summary judgment.

Procedural History

The Brotherhood Railway Carmen, on August 20, 1980, filed with the National Mediation Board an application pursuant to Section 2, Ninth, of the Railway La-

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[1] The BRC and Jack Weatherlow, a former Delpro employee, also raise the claim that Weatherlow was discharged by Delpro in violation of the Railway Act. The discriminatory discharge claim is not within the scope of the motions before the Court.

bor Act[2] requesting the Board to investigate an alleged representation dispute among Delpro's employees. The Board's investigation included an inquiry into whether Delpro is a "carrier" within the meaning of the Act.[3] During the course of the investigation Delpro made written submissions to the NMB in support of its position that the NMB lacked jurisdiction over it because it is not

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[2] Section 2, Ninth, of the Railway Labor Act, as amended, 45 U.S.C. §152, Ninth, provides:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

[3] Section 1, First, of the Act, 45 U.S.C. §151, First, provides *inter alia:*

> The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any car-

a "carrier." The NMB on October 1, 1980, issued a Determination of Jurisdiction in which it found that both Delpro and its parent corporation, Trailer Train Company ("Trailer Train"), are carriers within the meaning of the Railway Labor Act. The Board assumed jurisdiction over Delpro and directed that a Board Representative be assigned to complete the investigation of the alleged representation dispute. Delpro immediately notified the NMB that it intended to seek reconsideration of the Board's determination of jurisdiction and requested either a formal hearing or the opportunity to submit evidence and legal authorities on the issue. On October 8, 1980, by leave of the Board, Delpro filed a formal Petition for Reconsideration, with supporting affidavits and exhibits, in which it requested the NMB to overrule its determination of jurisdiction or to order a formal hearing on the matter. The Board denied Delpro's petition on October 15, 1980, concluding that the materials submitted by Delpro did not support its contention that it is not a carrier.

On October 23, 1980, Delpro commenced an action in this Court against the National Mediation Board, alleging that the Board had exceeded its statutory jurisdiction, and seeking a declaratory judgment that it is not a carrier, as well as related injunctive relief. On December 17, 1980, while that action was pending, the NMB certified the Brotherhood Railway Carmen as representative of the class of carmen, helpers and apprentices at Delpro. This Court, on March 6, 1981, issued an opinion and order which, although rejecting the Board's argument that the Court lacked jurisdiction to review the NMB's determination of jurisdiction, dismissed the action on the ground that the absence of the Brother-

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rier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. . . .

hood Railway Carmen from the action would have precluded the Court from entering a judgment that would finally resolve the question of Delpro's status as a carrier. *See Delpro Company v. National Mediation Board*, 509 F. Supp. 468 (D. Del. 1981).

The present litigation began on March 11, 1981, when Delpro filed its complaint seeking declaratory and injunctive relief against the NMB and the Brotherhood Railway Carmen. The BRC filed its action on March 12, 1981. Thereafter the NMB and the BRC moved for summary judgment against Delpro, and the BRC sought a preliminary injunction. The two actions were consolidated by an order of the Court filed on July 13, 1981. The Board and the BRC contend that they are entitled to summary judgment because undisputed facts developed in the administrative process establish Delpro's status as a carrier under the plain meaning of the Railway Labor Act. The BRC seeks by way of preliminary injunction to compel Delpro to commence labor negotiations and to provide the BRC with information needed for purposes of collective bargaining. Consideration of these motions has been delayed because of discovery disputes and other procedural skirmishes.

Standard of Review

Before addressing the merits of the questions raised, it is appropriate to first set out the appropriate standard for review of NMB jurisdictional decisions. In a prior related action this Court, although recognizing that federal courts have very limited power to review actions of the National Mediation Board, concluded that a court may consider an employer's contention that the Board had no power to act at all because the employer was not a "carrier" within the Board's statutory jurisdiction. *Delpro Co. v. National Mediation Board*, 509 F. Supp. 468, 472-75 (D. Del. 1981). The Court's power to review the Board's conclusion that Delpro is a carrier under the Act is not, however, unlimited.

The starting point in determining the appropriate standard of review is a careful analysis of just what is being reviewed. A Board determination of carrier status requires both findings of fact and conclusions of law. First, the Board must make factual findings on such issues as the nature and organizational structure of an employer's business and the type of work its employees do. Second, the Board must make conclusions of law in determining whether a company's business organization and activities qualify it as a "carrier" under Section 1, First, of the Railway Labor Act. The Court considered the proper scope of judicial review in the context of a discovery dispute earlier in this litigation.[4] There the Court determined that the Board's factual findings should be reviewed under the "arbitrary and capricious" test set out in section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. §706(2)(A).[5] In applying this test the Court must determine whether the agency "decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The focal point for this review is the administrative record, which must be examined to determine whether it supports the agency's findings. *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) (per curiam). In the context of this case, the Court must determine if the Board looked to the relevant factors for imposing carrier status and whether its findings of fact in this regard are supported by the record. To the extent that a determination of the relevant factors is based upon a construction of the applicable provisions of the Railway Labor Act the

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[4] *See* Delpro Co. v. Brotherhood Railway Carmen of the United States and Canada, Consol. C.A. No. 81-103, slip op. at 2-4 (D. Del. July 13, 1981).

[5] §706(2)(A) authorizes the Court to set aside agency findings and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Court may apply its own interpretation of that statute.[6] It is well established, however, that the construction of a statute by the administrative body charged with its administration or execution is entitled to considerable deference. *See, e.g., FCC v. WNCN Listeners Guild,* 101 S.Ct. 1266, 1276 (1981); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969); *Udall v. Tallman,* 380 U.S. 1, 16 (1965). In view of the National Mediation Board's experience in administering and applying the Railway Labor Act and its knowledge of the railroad industry, that deference is no less applicable in this case.

Statutory Definition of "Carrier"

> The Railway Labor Act defines a "carrier" as any express company, sleeping-car company, carrier by railroad subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . . .
>
> 45 U.S.C. §151, First.

The parties agree that Delpro is a carrier under this statute only if it satisfies a two part test, consisting of the "ownership or control" requirement and the "function" requirement. First, Delpro must be (a) owned by, (b) controlled by, or (c) under common control with, a carrier by railroad. Second, Delpro must (a) operate equipment or facilities, or (b) perform any service, in connection with the transportation, receipt, delivery, elevation,

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[6] 5 U.S.C. §706 provides in pertinent part that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."

transfer in transit, refrigeration or icing, storage, and handling of property by railroad.

In applying the first, or "ownership or control," aspect of this test, the Board focused on Delpro's corporate relation to Trailer Train, its parent, and to Trailer Train's stockholders. In applying the second, or "functional" aspect of the test, the Board focused on Delpro's provision of services which facilitate transportation of property by rail. For the reasons explained below the Court finds that these were the relevant factors to consider in the context of this case and that the Board's findings regarding material facts are supported by the record. The National Mediation Board and the Brotherhood Railway Carmen are therefore entitled to the entry of summary judgment in their favor.

Ownership or Control

Uncontroverted evidence in the administrative record established the following facts, which are in material respects not disputed by Delpro. Delpro is a wholly owned subsidiary of the Trailer Train Company.[7] Trailer Train owns the largest private fleet of railroad flatcars in the United States which it leases on a pooled basis to American railroads.[8] The stock of Trailer Train

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[7] Except where otherwise noted, all facts in this paragraph are taken from the Trailer Train Prospectus of May 13, 1980, submitted by Delpro to the National Mediation Board as an exhibit to its Petition for Reconsideration. This is included in the administrative record. *See* Doc. No. 29A.

[8] Trailer Train was incorporated by two railroads in 1955. Its origin is explained in the Trailer Train prospectus:

> The concept of a nationwide fleet of flatcars originated when railroads sought to combine the cost advantages of long haul rail transportation with the origin and terminal flexibility of trucking. The plan required a large number of cars, readily interchangeable among railroads and capable of transporting highway trailers in high mileage service under widely varying operating conditions. Efficient implementation of the plan required standardized design, heavy duty construction and vol-

is owned by twenty-nine operating railroads, the trustees of two former operating railroads and one freight forwarding company. Nearly all of the directors of Trailer Train are senior officers of the railroads holding interests in Trailer Train.[9] Only Trailer Train stockholders are eligible to participate in its flatcar pool. Railbox, a Trailer Train subsidiary, operates a pool of railroad boxcars that is not restricted to Trailer Train stockholders.[10] At least as of May 1980, car hire charges for Trailer Train and Railbox were set "at levels sufficient to meet the ordinary and necessary expenses of Trailer Train and Railbox, to establish for Trailer Train and Railbox financial positions enabling them to finance necessary car acquisitions on reasonable terms, and to keep the respective pools in the proper condition for operation at the highest point of efficiency."[11] Trailer Train's car contracts with railroads make Trailer Train responsible for maintenance of the leased equipment. Major maintenance work on equipment leased by Trailer Train is performed in substantial part by four wholly owned maintenance subsidiaries. Delpro is one of these subsidiaries, and Delpro's business operations are limited to repair of railroad cars owned by Trailer Train.

The Court is satisfied that the NMB was justified in concluding, based upon the above undisputed facts, that

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NOTE 8 — *(Continued)*

ume purchasing. Trailer Train was organized to acquire, finance and maintain a fleet of such cars.

See Doc. No. 29A (Exhibit C to Delpro's Petition for Reconsideration).

[9] *See* Exhibits 1 & 3 to the Verified Statement of C.D. Buford, President of Trailer Train, before the Interstate Commerce Commission dated October 19, 1979 (lists of stockholders and directors of Trailer Train as of that date).

[10] According to the Trailer Train May 1980 Prospectus, Railgon, another subsidiary, was scheduled to commence operations with a pool of gondola cars in late 1980 or 1981. That pool also would not be restricted to Trailer Train stockholders.

[11] *See* Trailer Train May 1980 Prospectus at 16.

Delpro is "directly or indirectly owned . . . by . . . any carrier by railroad. . . ." The stock of Trailer Train is held almost entirely by railroad companies that indisputably qualify as "carriers."[12] Delpro, as a wholly owned subsidiary, is therefore indirectly owned by a group of carriers by railroad. It is unimportant that Delpro is owned by a group of carriers, rather than by a single rail carrier. 1 U.S.C. §1, which provides rules of construction for federal statutes, expressly provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise — words imparting the singular include and apply to several persons, parties or things. . . ." There is no evidence that Congress intended to limit the term carrier to the singular in this context. Therefore, because such a literal reading of the statute would not further the Railway Labor Act's purpose of avoiding disruptions of interstate commerce as a result of labor disputes in the rail industry,[13] the Court concludes that "carrier" should not be limited to the singular.

It is also evident that Delpro satisfies the alternative test of being controlled by a group of carriers by railroad. Uncontroverted evidence showed that nearly all of Trailer Train's directors are senior officers of railroad shareholders. The fact that these railroads own nearly all of the stock of Trailer Train, and are represented on Trailer Train's board by their officers, establishes beyond question that these carriers "control" Trailer Train and its subsidiaries, including Delpro. Concededly, no one rail carrier could control Trailer Train or Delpro in the sense of manipulating those companies to further its interests at the expense of other shareholders. It is

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[12] Delpro itself urged in its complaint that the ownership interests of shareholders other than carriers by rail are insignificant ("TTX is not owned and controlled by any one rail carrier but rather its stockholders are, with a couple minor exceptions, some 29 competing rail carriers. . .). Complaint (Doc. No. 1) at 5.

[13] *See* 45 U.S.C. §151a.

enough, in my view, that the shareholding rail carriers may jointly control Trailer Train and Delpro to further their mutual interests. Nor does the Court finds any basis for concluding that the only type of "control" contemplated by the statute is direct supervision by a railroad of another company's day-to-day business operations or employment policies.[14] In this case the stockholding railroads control Delpro because, through their representatives on Trailer Train's Board of Directors, they are able to determine the corporate policies of Delpro.

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[14] There are a number of recent NMB cases which have applied a "control" test which looked at the degree to which a carrier influenced a contractor's day-to-day operations. *See, e.g.*, Ground Services, Inc. (San Diego), 7 N.M.B. No. 266 (1980); Missouri-Illinois Central Industries, Ltd., 7 N.M.B. No. 256 (1980); Boeing Airport Equipment, Inc., 7 N.M.B. No. 193 (1980). However, in none of these cases did the carrier have any ownership interest in the contracting company. Thus a different type of analysis was appropriate to determine whether a carrier controlled employees of a contractor who performed services traditionally performed by employees of carriers. In this case, the stockholding railroads control Delpro through their interlocking corporate relationships.

To the extent that Great Lakes Airlines, Inc., 4 N.M.B. 5 (1961), might support Delpro's position that a subsidiary of a carrier which performs repair work for its parent is not itself a carrier, the Court perceives no unfairness to Delpro in the NMB's decision to overrule that decision. The interpretation given the statute by the Board comports with its plain meaning. Moreover, administrative agencies, like courts, must be free to reconsider prior decisions in light of changing circumstances and developments in the law. In denying Delpro's Petition for Reconsideration the Board stated that it has been reexamining its jurisdictional standards "in light of changing corporate relationships and increasing use of contractors to perform work integral to rail and air transportation." A glance at the list of the carrier-shareholder participants in the Trailer Train pool makes plain that many of the nation's major rail carriers have elected to obtain a significant amount of their rail car needs from the Trailer Train pool in lieu of owning and maintaining their own cars. In these circumstances, the Court finds nothing unprincipled about the Board's decision.

The Function Test

Likewise, the Court is satisfied that the repair of railroad cars, a function essential to the operation of any railroad, constitutes the performance of a service in connection with the transportation of property by railroad. As has been aptly stated by another court construing a nearly identical statute, "[i]t is difficult to conceive of any supporting activity that is more inherent or vital to the sustained functioning of a railroad system than the repair and construction of its rolling stock." *Despatch Shops, Inc. v. Railroad Retirement Board*, 153 F.2d 644, 646 (D.C. Cir. 1946). If a railroad did not participate in the type of cooperative arrangement provided by Trailer Train, it would have to otherwise obtain and provide for the repair its own fleet of railroad cars. Indeed, the National Mediation Board indicated in its determination of jurisdiction that rail carriers historically owned and maintained their own cars. No one contends that workers engaged in the repair of railroad cars would not be covered by the Railway Labor Act if employed directly by a rail carrier. The statute does not require that these workers be excluded from such coverage simply because they are employed by a corporation formed as a joint venture by a group of rail carriers.

CONCLUSION

In sum, the Court concludes that the National Mediation Board considered the relevant factors in assessing Delpro's status as a carrier and that its material factual findings are fully supported by the administrative record. The Board properly concluded that Delpro's business activities and its corporate ties to a large group of

rail carriers qualified it as a "carrier" within the plain meaning of the Railway Labor Act.[15]

Because Delpro is a carrier, the Brotherhood Railway Carmen is entitled to an injunction compelling Delpro to "treat with" it. *Virginia Railway Co. v. System Federation*, 300 U.S. 515 (1937). The Brotherhood Railway Carmen has, however, moved only for preliminary injunctive relief, and not the permanent injunction authorized by the Railway Labor Act. Rather that enter preliminary relief at this stage, the Court will await the filing by the Brotherhood Railway Carmen of an appropriate pleading and proposed form of permanent injunction, on notice, at which time it will enter a statutory injunction pursuant to the Railway Labor Act.

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[15] The Court has considered all other arguments raised by Delpro and has found them to be without merit. In particular, the Court finds unavailing Delpro's argument that the Interstate Commerce Commission's prior determination that Trailer Train is not a commn carrier under the Interstate Commerce Act, 49 U.S.C. §1, is dispositive of Delpro's status as a carrier under the Railway Labor Act. On its face, the Railway Labor Act plainly extends both to companies that qualify as carriers under the Interstate Commerce Act, and those that fall within the specific standards laid out in 45 U.S.C. §151, First.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 81-103/81-106
Consolidated

DELPRO COMPANY,

Plaintiff,

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, et al.,

Defendants.

ORDER GRANTING PERMANENT INJUNCTIVE RELIEF

In accordance with the Opinion and Order of this Court dated August 7, 1981, authorizing the entry of summary judgment Delpro Company pursuant to the Railway Labor Act, it is now this 28th day of August,

ORDERED that Delpro Company, its agents, officers, directors, representatives, employees, servants, attorneys and all those acting on its behalf or in concert with it shall exert every reasonable effort to make an agreement with and to bargain in good faith with the Brotherhood Railway Carmen of the United States and Canada, the duly certified collective bargaining representative of the employees of Delpro Company, pursuant to the provisions of the Railway Labor Act.

/s/ MURRAY M. SCHWARTZ

United States District Judge

JUDGMENT TO BE REVIEWED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2475

DELPRO COMPANY

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO: LOCAL LODGE OF BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; and NATIONAL MEDIATION BOARD OF THE UNITED STATES OF AMERICA

(D. C. Civil No. 81-103)

JOHN TAYLOR, individ. and as representative Delpro Company, DAN LENTZ, individ. and as representative of Delpro Co., DAN MILLER, individ. and as representative of Delpro Co.

v.

JACK WEATHERLOW, individ. and Vice Chairman Brotherhood Railway Carmen Local Affiliate

(D.C. Civil No. 81-106)

DELPRO COMPANY,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Present: GIBBONS, SLOVITER and BECKER
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel on April 2, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered August 7, 1981, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

SALLY MRVOS
Clerk

April 13, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JULY 12, 1982

No. 81-2475

DELPRO COMPANY

Appellant

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; et al.,
(D.C. Civil No. 81-103)
JOHN TAYLOR, indiv. and as representative of Delpro Company, et al.

v.

JACK WEATHERLOW, indiv. and Vice Chairman, Brotherhood Railway Carmen Local Affiliate
(D.C. Civil No. 81-106)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority

of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ JOHN J. GIBBONS

Judge

Dated: May 14, 1982

STATUTES INVOLVED

1. *Railway Labor Act*

   a. §1, First, 44 Stat. 577 (1926):

   The term "carrier" includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act, including all floating carriers, e.g., such as boats, barges, tugs, bridges and ferries and other transportation facilities used by or operated in connection with any such carrier by railroad, and any receiver, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier" . . .

   b. §1, First, 48 Stat. 1185 (1934):

   The term "carrier" includes any express company, sleeping car company, carrier by railroad subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . .

   c. §2,48 Stat. 1186 (1934):

   The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein . . .

2. *National Labor Relations Act*

   a. §101, 61 Stat. 137 (1947):

   (2) the term "employer". . . shall not include . . . any person subject to the Railway Labor Act, as amended from time to time . . .

(3) The term "employee" . . . shall not include any individual employed by an employer subject to the Railway Labor Act, as amended from time to time.

3. *Interstate Commerce Act*

a. §400, 41 Stat. 474 (1920):
(3)(a) . . . The term "transportation" as used in this chapter shall include . . . all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

4. *Revised Interstate Commerce Act*

a. 92 Stat. 1338 (1978):

(24) "transportation" includes — . . .

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing ventilation, storage, handling, and interchange of passengers and property.

Office - Supreme Court, U.S.
FILED
OCT 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-308

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DELPRO COMPANY,

Petitioner

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL LODGE OF BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; AND NATIONAL MEDIATION BOARD OF THE UNITED STATES OF AMERICA,

Respondents

and

DELPRO COMPANY,

Petitioner

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, INDIVIDUALLY AND ON BEHALF OF THOSE EMPLOYEES WHOM IT IS CERTIFIED TO REPRESENT AND JACK WEATHERLOW, INDIVIDUALLY AND IN HIS CAPACITY AS VICE CHAIRMAN OF THE BROTHERHOOD RAILWAY CARMEN LOCAL AFFILIATE,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR BROTHERHOOD RAILWAY CARMEN IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit erred in finding that Delpro Company is a "carrier" as defined in the Railway Labor Act, 45 U.S.C. § 151 et seq.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-308

DELPRO COMPANY,

Petitioner

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL LODGE OF BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO; AND NATIONAL MEDIATION BOARD OF THE UNITED STATES OF AMERICA,

Respondents

and

DELPRO COMPANY,

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v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, INDIVIDUALLY AND ON BEHALF OF THOSE EMPLOYEES WHOM IT IS CERTIFIED TO REPRESENT AND JACK WEATHERLOW, INDIVIDUALLY AND IN HIS CAPACITY AS VICE CHAIRMAN OF THE BROTHERHOOD RAILWAY CARMEN LOCAL AFFILIATE,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR BROTHERHOOD RAILWAY CARMEN IN OPPOSITION

The Respondent, Brotherhood Railway Carmen of the United States and Canada, respectfully requests that this Court deny the petition for a writ of certiorari, seeking

review of the Third Circuit's judgment in this case. The Third Circuit, affirming the District Court and the National Mediation Board, held that Petitioner Delpro Company is a "carrier" within the meaning of the Railway Labor Act (45 U.S.C. § 151 et seq.) ("the Act") and thus subject to the jurisdiction of the Mediation Board. The opinions of the Courts below and the National Mediation Board are printed in an Appendix to the Petition ("App.").

STATEMENT OF THE CASE

This case arose when the Respondent Brotherhood Railway Carmen of the United States and Canada (hereinafter "the Brotherhood") filed with the Mediation Board an Application for Investigation of a Representation Dispute, pursuant to Section 2, Ninth of the Act. 45 U.S.C. § 152, Ninth. By this Application, the Brotherhood requested the Board to investigate a dispute which had arisen among the employees of Petitioner Delpro Company (hereinafter "Delpro") as to who should be the employees' designated representative for the purposes of collective bargaining with Delpro and to certify the Brotherhood as that authorized representative.

During the Board's investigation of the Brotherhood's Application, Delpro contested the Board's jurisdiction by claiming that Delpro was not a "carrier" within the meaning of the Act. Section 1, First of the Act (45 U.S.C. § 151, First), defines the term "carrier" to include:

> any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling

> of property transported by railroad, and any receiver, trustee, or other individual or body judicial or otherwise, when in the possession of the business of any such "carrier". . . .

Delpro is a wholly-owned subsidiary of Trailer Train Company. Delpro's sole business is repair and maintenance of railroad freight cars owned by Trailer Train Company and two other Trailer Train subsidiaries. Trailer Train Company is owned by 29 railroads and two former railroads (all carriers within the meaning of the Act) and one freight forwarder. Trailer Train's board of directors consists of 44 senior officials of the owning carriers. Trailer Train's principal officers are also officers of Delpro.

The Mediation Board rejected Delpro's challenge to its jurisdiction. It concluded that Trailer Train Company and Delpro "[b]oth are owned and controlled by rail carriers, either directly or indirectly [and] exist solely to facilitate rail transportation by supplying or maintaining equipment to be used by rail carriers, which equipment historically has been owned and maintained by rail carriers." (App. A-21-A-27). Delpro moved for reconsideration, after which the Board reaffirmed its decision. (App. A-28-A-33).

Having resolved this jurisdictional challenge, the Board proceeded to conduct a secret ballot election among the employees of Delpro in the craft or class of "Carmen, Helpers and Apprentices" to determine their representation choice. The Brotherhood won this election by a vote of 103-1. Based on these results, the Board issued its Certification that the Brotherhood had been duly designated and authorized to represent Delpro's employees for the purposes of the Act. (App. A-34-A-35).

Delpro refused to bargain with the Brotherhood and filed suit in the U.S. District Court for the District of Delaware seeking to set aside the Board's Certification and to obtain a declaratory judgment that Delpro is not

a "carrier". Prior to service of Delpro's Complaint, the Brotherhood filed a separate action seeking, *inter alia*, to enjoin Delpro from refusing to bargain in good faith with the Brotherhood in violation of its obligation to do so under the Act.

The District Court found that the Board had applied the proper tests in determining Delpro's "carrier" status and that the Board's findings regarding material facts were fully supported by the administrative record. (App. A-37-A-48).

The Court of Appeals affirmed. (App. A-5-A-13). It found that Delpro's contention that the Act covers only companies owned or controlled by a single carrier, and not those owned or controlled by a group of carriers, "simply makes no sense, since the potential for disruption to commerce by rail could be as great or even greater in the [latter] case." (App. A-8). The Court of Appeals also rejected as contrary to the statute's plain meaning Delpro's contention that the ownership and control tests expressed in Section 1, First of the Act were not alternative tests for carrier status. (App. A-10-A-11).

Finally, the Court of Appeals "endorse[d] the district court's reasoning that inasmuch as maintenance workers employed directly by a carrier would unquestionably be covered by the Railway Labor Act, so also should those workers employed by a subsidiary such as Delpro that is indirectly owned by a group of carriers." (App. A-12). The Court thus rejected Delpro's position that the use of the words "transportation" and "transported" in Section 1, First was intended "to exclude those performing essential services as repair work connected with the transportation of property by railroad." (App. A-11-A-12).

Delpro's petition for rehearing *en banc* was denied. (App. A-53-A-54).

REASONS FOR DENYING THE WRIT

A. None of the Reasons Supporting Review Set Forth in Rule 19 is Present.

The petition fails to demonstrate that any of the reasons in support of review in Rule 19 are present. The Court of Appeals relied upon the plain language of the statute and the undisputed facts of record to hold that Delpro is a "carrier" under the Act.

There is no conflict between the Court of Appeals' decision and the decision of another court of appeals; there is no question of federal law which should be settled by this Court, and there is no conflict with applicable decisions of this Court. See Rule 19 (b), Rules of Supreme Court.

B. The Decisions of the Courts Below—That Under the Facts of Record, the Mediation Board Properly Determined Delpro to be a Carrier Under the Act—Do Not Warrant Review By This Court.

Petitioner would have this Court grant review to consider and reverse the decisions of both lower courts and the Mediation Board that the Railway Labor Act applies to Delpro. Petitioner does not challenge the factual findings below. Admitting those facts, and that it is "owned or controlled" by a carrier as provided in Section 1, First (Petition p. 9, fr. 18), Delpro asserts that the lower courts and the Mediation Board erred in holding that the railroad freight car repair and maintenance service Delpro provides the nation's rail carrier meets the statutory definition of "any service . . . in connection with the transportation . . . of property transported by railroad." 45 U.S.C. § 151, First. Plainly, the lower courts' finding that the repair of railroad cars is a function essential to the operation of any railroad and consequently constitutes the performance of a service in connection with the transportation of property by railroad is well-founded.

Delpro seeks review by this Court essentially because its employees do not handle the property being transported, only the cars in which the property is being transported. The Court of Appeals considered this distinction and found it to be without significance in light of the overall purpose and intent of the Act. (App. A-11-A-12).

Petitioner seizes upon the Court of Appeals' description of Delpro's "parsing of the statutory language [as] somewhat plausible" (App. A-11) to launch an argument that this Court must review the lower courts' decisions to clear up this purported ambiguity in the construction of the Act. There is in fact no such ambiguity. Acceptance of Delpro's argument would permit railroads "to take from under the Act virtually all of their workers whose employment is in the 'supporting' activities, through the simple expedient of sitting up wholly owned corporate affiliates to perform these services . . . [thereby] so severely limit[ing the Act] as to render [it] of little worth in achieving the purposes for which [it was] passed." *Despatch Shops, Inc. v. Railroad Retirement Board*, 153 F.2d 644, 646 (D.C. Cir. 1946).

The Court of Appeals' analysis is wholly consistent with this Court's application of identical language in the Railroad Retirement Act, 45 U.S.C. § 228a. In *Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946), Duquesne argued that the work of loading and unloading freight cars was not a part of railroad transportation because "these services are rendered before railroad transportation has begun or after it has ended . . . ." 326 U.S. at 453-454. This Court rejected Duquesne's argument, like the Court of Appeals rejected Delpro's argument, in finding the crux of the case to be

> "whether a carrier's affiliate is performing a service that could be performed by the carrier and charged

> for under the line-haul tariffs. If it is such a service, it is a transportation service within the meaning of the present Acts. . . . We think it plain that the definitions in question include at the very least those activities which would be transportation services when performed by a railroad but which it chooses to have performed by its affiliate."

Id. at 454. See *Despatch Shops v. Railroad Retirement Board, supra*, 153 F.2d at 646 ("It is difficult to conceive of any supporting activity that is more inherent or vital to the sustained functioning of a railroad system than the repair and construction of its rolling stock.").

Finally, there is no basis for Petitioner's assertion that the decision of the Court of Appeals forebodes far-reaching traumatic consequences for employees of all carrier subsidiaries, which consequences will "present recurring questions of interpretation" and are "likely to spawn further litigation." (Petition, pp. 8, 9). The simple fact is that the Mediation Board determines "carrier" status only in the context of applications requesting its services, on a case-by-case basis. Little litigation has occurred on this question in the past and little is likely to ensue as a result of the lower courts' disposition of the matter.

Moreover, the Court of Appeals' analysis of the statute is consistent with that of every other court which has considered the issue. See *Northwest Airlines v. Jackson*, 185 F.2d 74, 77 (8th Cir. 1950), cert. denied, 342 U.S. 812 (1951) ("The Railway Labor Act was intended to apply only to transportation activities and that work which bears more than a tenuous, negligible and remote relationship to transportation activities."); *Pan American World Airways Inc. v. United Bro. of Carpenters*, 324 F.2d 217, 220 (9th Cir. 1963), cert. denied, 376 U.S. 964 (1964) ("The statute thus made certain that railroads could not escape the application of the statute to activities closely related to railroad transportation, by

having those activities carried on by subsidiary or controlled enterprises.").

Petitioner's efforts to have this Court review the uniform holdings of the Mediation Board and the courts below so to overrule universally accepted applications of the clear language and intent of the statute should be rejected.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 82-308

In the Supreme Court of the United States

OCTOBER TERM, 1982

DELPRO COMPANY, PETITIONER

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner, a railcar repair company that is indirectly owned by a group of railroad carriers, contends that it is not subject to the jurisdiction of the National Mediation Board pursuant to 45 U.S.C. 151 First.

1. On August 20, 1980, the Brotherhood Railway Carmen of the United States and Canada, AFL-CIO, filed an application with the National Mediation Board pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. 152 Ninth, asserting the existence of a representation dispute involving approximately 135 "carmen-mechanics" employed by petitioner Delpro Company. Petitioner is engaged in the repair of railcars and is indirectly owned by a consortium of 30 railroads. Pursuant to its statutory mandate, the Board routinely investigated the matter and determined that petitioner is a "carrier" subject to its jurisdiction within the

meaning of 45 U.S.C. 151 First (Pet. App. A-21 to A-27). On petitioner's application for reconsideration, the Board reaffirmed its earlier determination of jurisdiction (*id.* at A-28 to A-33). Subsequently, on December 17, 1980, an election was held and the overwhelming majority of eligible employees voted for representation by the union (*id.* at A-34 to A-35).

Petitioner filed this action for declaratory and injunctive relief in the United States District Court for the District of Delaware, challenging the Board's determination of jurisdiction. The district court held that the Board properly exercised jurisdiction over petitioner (Pet. App. A-36 to A-48; 519 F. Supp. 842). The court of appeals affirmed (Pet. App. A-3 to A-13; 676 F.2d 960), concluding that "inasmuch as maintenance workers employed directly by a carrier would unquestionably be covered by the Railway Labor Act, so also should those workers employed by a subsidiary such as [petitioner] that is indirectly owned by a group of carriers" (Pet. App. A-12).

2. The decision of the court of appeals is correct, does not conflict with the decision of any other court and does not warrant review.

a. Petitioner contends (Pet. 10-11) that the court of appeals' decision is contrary to the plain language of the statute. This contention is insubstantial.

The statute, 45 U.S.C. 151 First, provides that the term "carrier" includes

> any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation,

> receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad * * *.

Petitioner argues (Pet. 11; emphasis in original) that it does not fall within this definition because "[t]he repair and maintenance which Delpro performs do *not* in any manner directly involve any 'property transported by railroad.' " But the statute by its express terms covers any railroad subsidiary that "performs *any service* * * * *in connection with the transportation*" of property by railroad. As the court of appeals correctly concluded (Pet. App. A-11 to A-12), the repair and maintenance of railroad cars clearly is a service connected with the transportation of goods by railroad. Contrary to petitioner's contention, the statute does not require that a carrier be "directly involve[d]" with the property transported by railroad. The statute's broad language reflects Congress' intent to ensure that entities such as petitioner would be covered by the RLA. See *Pan American World Airways, Inc.* v. *United Brotherhood of Carpenters*, 324 F.2d 217, 220 (9th Cir. 1963). Cf. *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 326 U.S. 446, 454 (1946).

b. Petitioner's reliance (Pet. 12-16) on the legislative history of the RLA amendments is unavailing.[1] As introduced in the Senate, the pertinent amendment to the RLA would have defined "carrier" as including "any company operating any equipment or facilities or furnishing any service included within the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce

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[1] Petitioner's resort in this Court to the legislative history of the Act is ironic because in its petition for rehearing en banc in the court of appeals (Pet. for Reh'g 3), petitioner argued that the panel erred in relying on "legislative intent or extraneous aids" in construing the plain language of the statute.

Act." S. 3266, 73d Cong., 2d Sess., § 1 First (1934). In his testimony before the Senate Committee on Interstate Commerce, Joseph Eastman, the Federal Coordinator of Transportation, described the proposed definition of "carrier" in the Senate bill as

> intended to bring within the scope of the act operations which form an *integral part of railroad transportation,* but which are performed by companies which are not now subject to the Railway Labor Act. * * * [For example,] the companies to which railroads have on occasion *contracted out their maintenance work on equipment* and even on way and structures. The thought is that concerns which function in this way as an *integral part of the railroad transportation system* should be subject to the same duties and obligations with respect to labor controversies as the railroads themselves * * *.

To Amend the Railway Labor Act: Hearings on S. 3266 Before the Senate Comm. on Interstate Commerce, 73d Cong., 2d Sess. 10 (1934) (emphasis supplied) ("*Senate Hearings*"). The Committee Chairman suggested that the definition should be redrafted so as not to incorporate by reference definitions in another statute. *Id.* at 11. In addition, a railroad representative objected to the term "any company" as possibly including independent contractors hired to build bridges, construct new lines or new railroad stations. *Id.* at 56-58 (testimony of M.W. Clement). Mr. Clement distinguished between routine maintenance work, ordinarily handled by railroad maintenance workers, and major construction projects, which he viewed as outside the railroad field. *Ibid.*

In response to these comments, Mr. Eastman redrafted the definition section of the bill to eliminate outside companies engaged in construction work for railroads. *Senate Hearings, supra,* at 145. In addition, Mr. Eastman stated

that the new draft, which subsequently was enacted without pertinent changes, limited the definition to "carriers and their subsidiaries engaged in transportation." *Ibid.* See *Railway Labor Act Amendments: Hearings on H.R. 7650 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 18 (1934). There is nothing in this history that suggests that the definition of "carrier" in the RLA was intended to exclude railroad subsidiaries that are engaged in the repair and maintenance of railroad cars and equipment, a service that Mr. Eastman described as "an integral part of the railroad transportation system." *Senate Hearings, supra*, at 10. Indeed, as one court has observed in this connection, "[i]t is difficult to conceive of any supporting activity that is more inherent or vital to the sustained functioning of a railroad system than the repair and construction of its rolling stock." *Despatch Shops, Inc.* v. *Railroad Retirement Board*, 153 F.2d 644, 646 (D.C. Cir. 1946). Cf. *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 554-556 (1937); *United States* v. *Feaster*, 410 F.2d 1354, 1371 (5th Cir.), cert. denied, 396 U.S. 962 (1969).

c. Petitioner's suggestion (Pet. 17-20) that the decision below is inconsistent with the congressional purpose underlying the RLA is mistaken. Congress enacted the RLA out of its concern to avoid disruptions of vital interstate rail transportation. See 45 U.S.C. 151a. Through the RLA and the National Mediation Board, Congress established a specially tailored labor relations framework that is believed to be "the most effective means of preventing such disruptions * * *." *United Transportation Union* v. *Long Island R.R.*, No. 80-1925 (Mar. 24, 1982), slip op. 10. See also *Detroit & T.S.L.R.R.* v. *United Transportation Union*, 396 U.S. 142, 148-149 (1969); *Brotherhood of Railway Clerks* v. *Florida E.C. Ry.* 384 U.S. 238, 246 (1966).

It is uncontroverted that petitioner and its parent corporation, Trailer Train Company, are part of an elaborate subsidiarization scheme involving more than two dozen of the largest railroads in the nation (see Pet. App. A-37 to A-39). If a subsidiary like petitioner is not regarded as a "carrier" under the RLA, then railroads could easily insulate their various support services from the special labor protections of the RLA "through the simple expedient of setting up wholly owned corporate affiliates to perform these services. It is conceivable that everything from maintenance-of-way through engineering or bookkeeping might be done by so called 'independent' corporations." *Despatch Shops, Inc.* v. *Railroad Retirement Board, supra,* 153 F.2d at 646. This result clearly would thwart the goal that Congress sought to achieve in enacting the RLA.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1982

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